



**THE  
INDIAN LAW REPORTS  
Allahabad Series**

Containing Cases determined by the High Court at Allahabad  
and by the Supreme Court of India on appeal therefrom

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**Reporters:**

IFTIKHAR HUSAIN

GOPINATH

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} Advocates, High Court.

**1959**

**Volume I**

**JANUARY—JUNE**



JUDGES OF THE HIGH COURT OF JUDICATURE  
AT ALLAHABAD.

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1959

*Chief Justice:*

The Hon'ble ORBY HOWELL MOOTHAM

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*Judges:*

The Hon'ble Mr. JUSTICE RAGHUBAR DAYAL.  
The Hon'ble Mr. JUSTICE M. C. DESAI.  
The Hon'ble Mr. JUSTICE VASISHT BHARGAVA.  
The Hon'ble Mr. JUSTICE RAM NARAIN GURTU.  
The Hon'ble Mr. JUSTICE NASIR ULLAH BEG.  
The Hon'ble Mr. JUSTICE BASUDEVA MUKERJI.  
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The Hon'ble Mr. JUSTICE D. S. MATHUR.

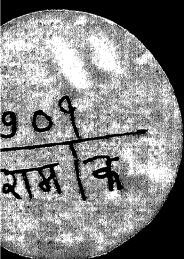
(Took his seat on 15th January, 1959).

The Hon'ble Mr. JUSTICE DEVI PRASAD UNIAL.

(Took his seat on 15th January, 1959).

The Hon'ble Mr. JUSTICE S. N. DWIVEDI.

(Took his seat on 12th May, 1959).



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**1959**

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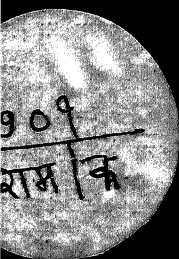


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*Held*, that in computing the total agricultural income on which an assessee is chargeable to agricultural income-tax any losses which he may sustain in any of the two sources (i.e. income under ss. 5 and 6 of the Act) which go to make up his total agricultural income have to be set off against the total earnings of the two sources (i.e. under ss. 5 and 6 of the Act), of the assessee.

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Patandin was granted a licence for the liquor shop in Mohalla Naushera and Jagat Narain was granted a licence for the liquor shop in Mohalla Pure Ghose in an auction held by the Excise authorities in Gonda. Both of them did not deposit the sale money and the sale in their favour was set aside and a fresh sale was held in which the present petitioners were the highest bidders of the above two liquor shops. Patandin and Jagat Narain filed appeals against the setting aside of the sale and the resale to the Excise Commissioner at Allahabad and their appeals were allowed. The licences of the petitioners were consequently terminated and a fresh sale was to be held on 2nd December, 1958.

*Held*, (i) that what is restricted by the provisions of the proviso to clause 14 of the United Provinces High Courts' (Amalgamation) Order, 1948, is the territory from where a cause has arisen in respect of which the powers to issue a writ are to be exercised. If Judges sitting at Allahabad could issue a writ of *certiorari* to quash the order of the Excise Commissioner then the same order could be passed by Judges of the Lucknow Bench, provided the origin of the cause in respect of which the order was to be made arose or originated within an area from where cases could be filed at Lucknow;

(ii) also that Gonda was the place of origin of the case which culminated at Allahabad and the High Court Bench at Lucknow has the jurisdiction to issue an order in this writ petition;

(iii) also that this petition is not maintainable on the ground that the petitioners had another equally efficacious remedy open to them inasmuch as the petitioners may file a petition of revision to the State Government against the order of the Excise Commissioner under rule 130 of the Excise Manual;

(iv) also that this petition is not maintainable as there is nothing to show that there was any error apparent on the face of the record or that there was any failure of natural justice

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Ordinarily the High Court will decline to lend its extraordinary power under Art. 226 of the Constitution in any case where an alternative remedy existed but has not been pursued but that is a rule of self-discipline and in appropriate cases the Court will extend its existence in spite of such a defect in the case.

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It is a very salutary rule that the petitioner for a writ of *certiorari* must show that he has taken his objection to jurisdiction before the subordinate tribunal or authority itself or else explain, through the affidavit, his inability to do so. Failure to do either does not, however, operate as an absolute bar to the exercise of discretion in issuing the writ.

*Held*, further, that such an objection to the conduct of the petitioner disentitling him to relief could not be raised for the first time in Special Appeal.

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The power of the High Court to interfere under s. 115, Civil Procedure Code, 1908, becomes operative if an erroneous decision of a subordinate court resulted in its exercising jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested or acting with material irregularity or illegality in the exercise of its jurisdiction.

A suit filed by a landlord under s. 5(4) of the U. P. Temporary Control of Rent and Eviction Act, 1947, on the allegation that he had constructed a portion of the accommodation anew was only maintainable if it was based on the inadequacy of the reasonable annual rent and for that purpose the necessary jurisdictional fact to be found was the date of the construction of the accommodation and if the court wrongly decided that fact and thereby conferred jurisdiction upon itself which it did not possess, it exercised jurisdiction not vested in it and the High Court had power to interfere under s. 115 and it could then determine whether the question of the date of construction was rightly or wrongly decided.

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The provision for arbitration under s. 12 of the Consolidation of Holdings Act, is governed by the Arbitration Act, 1940, and accordingly an appeal lies against orders falling within the purview of s. 39(1) of the latter Act.

Thus, the order of the Civil Judge setting aside or refusing to set aside the award is appealable and the writ of *certiorari* for quashing the same cannot, therefore, be available to one who invokes the power of the High Court under Art. 226 of the Constitution without trying his remedy by way of appeal.

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A prayer in general terms for a certificate for leave to appeal to the Supreme Court under Art. 133 of the Constitution of India does not comply with the rules and is defective and not entertainable. In view of rule 3(1) of O. XLV of the Civil Procedure Code, 1908, a petition under Art. 133(1) of the Constitution of India must contain, in addition to stating the grounds of appeal, a prayer which clearly states the provision or provisions of that Article under which a certificate is asked for.

*District Board, Allahabad v. Syed Tahir Husain* ...

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—*Art. 226—Indian Contract Act, 1872—Payment under a mistake of law—Whether recoverable—Indian Evidence Act, 1872, s. 115—Both the parties under a mistake of law—Whether estoppel arises.*

The respondent by a petition under Art. 226 of the Constitution of India asked for the quashing of assessment orders relating to forward transactions and claimed a refund of amounts paid by way of tax in respect of such transactions from the Government on the ground that levy of such tax had been declared *ultra vires*. The principal defence by the Government was that the amounts were paid under a mistake of law and were, therefore, irrecoverable. The High Court directed refund holding that s. 72 of the Indian Contract Act applied and the Government

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could not retain moneys unlawfully received by it. On an appeal by the Government to the Supreme Court.

*Held*, that s. 72 of the Indian Contract Act is wide enough to cover mistake of fact as well as mistake of law. There is no conflict between the provisions of section 72 of the Act on the one hand and ss. 21 and 22 on the other. The true position is that if one party under a mistake whether of fact or law pays to another party money which is not due by contract or otherwise that money must be repaid. Where, therefore, the tax liability was *ultra vires*, the amounts were paid by the respondent when they were not due by contract or otherwise. The respondent consequently, was entitled to recover the amounts under s. 72 of the Indian Contract Act.

*Held*, further, that no question of estoppel can arise, where both the parties, as in the present case, are labouring under a mistake of law, and one party is not more to blame than the other.

The appeal, accordingly, was dismissed.

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Rule 148 of the Railway Establishment Code is not invalid.

A civil servant does not hold office during good behaviour but during the pleasure of the President or of the Governor according as to whether he holds a civil post under the Union or State and there is nothing to prevent the President or the Governor as the case may be regulating the conditions of service of persons appointed to such posts subject to the provisions of Article 311 (2).

A permanent railway servant although he entered into no formal agreement with the railway administration is nevertheless bound by Rule 148 and his service is liable to be terminated on one month's notice under Rule 148 of the Railway Establishment Code.

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Construction of decree for mesne profits—Period for which such  
profits recoverable, provided by O. XX, r. 12, Civil Procedure  
Code, 1908—Date of decree, for the purpose of such computa-  
tion, is when it becomes final ... ..

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**Constructive res judicata**—Plea of, not available to the son in execution proceedings against his share in the Mitakshara joint family property, where claim in the original suit withdrawn against him without adjudication on merits and decree passed against father alone, and it was not shown that the debt was fictitious or tainted with immorality or illegality ...

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**Criminal Revision**—*Power of High Court to recall its decision in—Rehearing, if and when permissible—Code of Criminal Procedure, 1898, ss. 369 and 561-A.*

A criminal revision was heard and decided on merits by the High Court without hearing the applicants or their counsel as no one appeared when the case came up for hearing. The counsel for the applicants who had filed an application for the adjournment of all his cases, including the revision, during that interval, later moved an application for a rehearing of the revision. The competence of the High Court to entertain such applications being referred to the Full Bench as a general proposition:

*Held (Per DAYAL and CHATURVEDI, JJ., MOOTHAM, C. J., contra)*—(i) that by virtue of its inherent power reserved under s. 561-A and excluded from its purview by s. 369 of the Code of Criminal Procedure, the High Court can revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same.

(ii) that this power has, however, to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests laid down in s. 561-A itself, viz. "to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice".

Observations in *U. J. S. Chopra v. State of Bombay* distinguished on the ground that the same did not refer to the inherent power of the High Court.

(*Per MOOTHAM, C. J.*)—As soon as its judgment in a criminal revision case has been signed and sealed, the High Court becomes *functus officio* and has no power to revoke, review, recall or alter the order it has already made. Decisions to the contrary are based on the erroneous assumption that the provisions of the Code are subject to s. 561-A.

The rule would, not, however, apply where an order has been passed without jurisdiction. Such a judgment or order is a nullity and the case must be reheard.

*Raj Narain v. State* ... ..

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—*Jurisdiction of High Court—Whether exercisable by a Judge or Judges suo moto—Code of Criminal Procedure, 1898, ss. 435 and 439—Rules of Court, 1952, Ch. V. r. 1.*

Judges of the High Court can exercise the jurisdiction and power of the High Court only when the matter comes before them according to the procedure established by law. A judge of Allahabad High Court, is, therefore, in view of r. 1 of Ch. V of the Rules of Court, competent to take cognizance only of such cases or matters as are allotted to him by or under directions from the Chief Justice.

A Bench of the High Court while disposing of a Criminal Appeal ordered the prosecution of a witness in that case, for perjury and forgery. Information about the conviction of being requisitioned and received, the Judges who constituted the aforesaid Bench passed an order for the issue of a notice on X to show cause why the sentence should not be enhanced. On the case coming up for final hearing.

*Held*, that the Bench became *functus officio* after passing the necessary order for prosecution of X and could not take further cognizance of the matter unless it was reconstituted and the matter placed before it by an order or direction from the Chief Justice. The issue of notice giving rise to the criminal revision was, therefore, without jurisdiction and the same must accordingly be discharged.

State *v.* Devi Dayal

**Criminal Trial—Accused—Several statements of the accused, admissibility of—Criminal Procedure Code, 1898, ss. 342 and 251-A, scope of.**

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It is proved that the accused made an illegal demand and K. N. Lal the Railway guard paid Rs.300 as illegal gratification. The accused made his first statement on the 14th February, 1955 at the time when the trap was laid. The accused made several other statements, his second statement on the 10th April, 1956 and his third statement on the 14th May, 1956 and that the statement on 5th November, 1956 and his last statement on 24th January, 1957.

*Held*, that there is only one provision of law, viz. s. 342, Criminal Procedure Code under which the statements of the accused are recorded. No statement of an accused person is recorded under any other section and s. 251-A, Criminal Procedure Code only mentions the stage at which the statement is to be recorded. It will be erroneous to say that any statement of an accused is recorded under s. 251-A, Criminal Procedure Code. A trial court has a right to put any question to an accused person at any stage and the record of every such statement of the accused would be under s. 342, Criminal Procedure Code. Every statement of the accused stands on the same footing and it is incorrect to distinguish between the statements of the accused person and to say that one statement is more important than the other. Consequently all the statements of the accused are admissible in evidence.

C. N. Peters *v.* State

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—*Identification proceedings after release of accused on bail—Effect on evidentiary value of—Indian Evidence Act, 1872, s. 9.*

Where an accused secures his release on bail before identification proceedings on the express assurance that the same would be at his own risk and responsibility, he cannot rely on that circumstance alone for discarding the evidence of identification, specially where there is no evidence to show what precautions, if any, the accused took to conceal his identity from the witnesses or to prove or suggest that he was actually seen by them or that there was any enmity between them and the accused.

The rule is founded not on the principle of estoppel but on the fact that each case has and must be decided according to its own peculiarities.

Mulu Singh v. State ...

—*Charge under s. 186, Indian Penal Code, 1860—Report by a public servant at the police station—Criminal Procedure Code, 1898, s. 4(1) (h), Complaint, applicability of—Criminal Procedure Code, 1898, s. 195(1) (a), scope of.*

583

A. H. Chishti, the Sales Tax Officer, Lucknow, was inspecting the shop of Ahmad Hasan Waheed Hasan, Udaiganj, Cantonment Road, Lucknow, on the 19th October, 1956 when Jamuna Prasad, the accused, came there and interfered in the discharge of his official duties as a public servant and also misbehaved. Sri Chishti immediately lodged a report of this incident at the police station. The police thereupon, submitted a charge-sheet against the accused under s. 186, Criminal Procedure Code, Sri Chishti, appeared as a prosecution witness in this case and he proved the report. The accused was convicted under s. 186, Indian Penal Code. A revision was filed against this order.

*Held*, (i) that the report lodged by Sri Chishti cannot be construed as a complaint under s. 4(1) (h), Criminal Procedure Code;

(ii) that the requirements of s. 195 are (a) that the accusation should be made to the Magistrate.

(b). This accusation should be made with a view to his taking action under the Code;

(iii) that the restrictions imposed by s. 195, Criminal Procedure Code are not a mere technicality but they are imperative and a disregard of these provisions vitiates the whole proceedings which are not cured by the provisions of s. 537, Criminal Procedure Code. A Magistrate has no jurisdiction to proceed on the mere report of the police officer.

Jamuna Prasad v. State ...

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*Date of taking effect of permit—if necessary to be stated in the application under the first alternative mentioned in s. 57(2) of the Motor Vehicles Act, 1939* ...

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- Deficiency of profits in new business**—Excess of profits in the old business—Right of assessee to claim set off, under s. 2(5), Excess Profits Tax Act, 1940 ... 103
- Delay due to Court's fault**—In passing preliminary order under s. 145(i) Code of Criminal Procedure beyond two months of dispossession of the property in dispute—Can Magistrate order putting him in possession ... 384
- Dispossession**—*Breach of peace—Preliminary order under s. 145 (1), Criminal Procedure Code passed more than two months after dispossession—Order, validity of—Criminal Procedure Code, 1898, s. 145(4), scope of.*
- Where a dispossessed person seeks relief under the provisions of s. 145, Criminal Procedure Code and the Magistrate passes his preliminary order under s. 145(4), Criminal Procedure Code more than two months after such dispossession but by his final order he puts him in possession, this order cannot be deemed to be a valid order on the ground that the court itself was responsible for this delay and so a party cannot be penalised for the fault committed by the court.
- Ganga Bux Singh v. Sukhdin ... 384
- "Disqualified"**—In the U. P. Town Areas Act, 1914 and the U. P. Municipalities Act, 1916—Not synonymous with "not qualified"—Vital difference between the two terms ... 157
- District Magistrate**—Allotment power of—Provision for exercise within 30 days of receipt of intimation of vacancy, under Rule 3 of the Control of Rent and Eviction Rules, 1949—not mandatory ... 284
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- Drugs stocked and exhibited for sale**—*Sub-standard quality of—Failure of Government Analyst to give protocols of test applied—Effect of, on prosecution—Drugs Act, 1940, ss. 25, 27—United Provinces Drugs Rules, 1945, r. 46.*
- Omission of the Government Analyst to give full protocols of test applied amounts to a fatal defect in the prosecution since it seriously prejudices the accused in so far as he is unable to avail of his right, within the prescribed time, to challenge and to controvert the conclusiveness of the report on the quality of the drugs stocked and exhibited by him for sale.
- Gyanendra Nath Mittal v. State ... 734
- Election**—Of President, under the U. P. Municipalities (Conduct of Election of Presidents and Election Petitions) Order, 1950—System of proportional representation—Two continuing candidates securing equal votes—Result by lot ... 154
- Election Tribunal**—Cannot assail the correctness of entries made in the Electoral roll, prepared under the U. P. Town Areas

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- Electoral roll**—Prepared under the U. P. Town Areas Act, 1914—Final and conclusive as far as fulfilment of prescribed qualifications of a person for registration as a voter—Election tribunal cannot assail the correctness of entries Disqualification of a voter though can be questioned and tried by it ... 157
- Estoppel**—If, arises—Where both parties labour under a mistake of law, and no party is more to blame. ... 62
- Execution of the Decree**—*Decree for sale—Mortgage—Zamindari Abolition—Application for sale of Groves—Sir and khudkasht rights—Groves—Bhumidhari rights—Sir and khudkasht rights, if subject to sale in execution of the Decree—Ancillary application scope of Civil Procedure Code, 1908, s. 48, applicability of.*

An execution application for the sale of the mortgaged property filed on 25th May, 1940, was pending when the Uttar Pradesh Zamindari Abolition and Land Reforms Act, came into force. The decree-holder on 20th September, 1952 applied to the Sales Officer to whom the decree was sent for execution that the judgment debtor's rights in the proprietary groves, *sir* and *khudkasht* be put to sale. The judgment-debtor opposed this application. The Sales Officer sent the case back for disposal to the Civil Court. The execution court held that the *Bhumidhari* rights acquired by the judgment-debtor under s. 18 of the Zamindari Abolition and Land Reforms Act can be sold in execution of the decree.

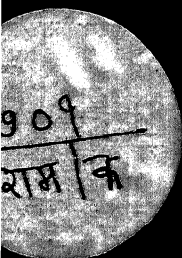
On an appeal by the judgment-debtor:

*Held*, (i) that the *sir* and *khudkasht* rights could not exist independently of the proprietary rights of the erstwhile zamindar and it is those very rights which have been continued with some modifications and are now called *bhumidhari* rights;

(ii) that the *bhumidhari* rights are transferable for all practical purposes and they having accrued because of the *sir* and *khudkasht* rights of the mortgagor in the mortgaged property, the *bhumidhari* rights continue to be subject to the mortgage as being part of the mortgaged property;

(iii) that the *bhumidhari* rights in the *sir* and *khudkasht* lands and the proprietor's groves are subject to sale in execution of the mortgage decree also as substituted security assuming for the sake of arguments that these rights did not form part of the mortgaged property;

(iv) that the application dated the 20th September, 1952 was not a fresh application but an incidental or ancillary applica-



tion made in connection with the pending execution case started with the execution application of 25th May, 1940. This application is not barred by s. 48, Civil Procedure Code and no rule of limitation is applicable to such an ancillary application.

Rana Sheoambar Singh v. The Allahabad Bank Ltd., Allahabad ... ..

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**Excess Profits Tax**—*Deficiency of profits in new business—Excess profits earned in the old business—Right of assessee to claim set off—Excess Profits Tax Act, 1940, ss. 2(5), 5 and 7.*

The scheme of the Excess Profits Tax Act is to allow one single owner, carrying on more than one business during the whole period in which liability to excess profits tax is imposed by the Act, the benefit of adjustment of his deficiency in any of the chargeable accounting periods against the excess profits in any other chargeable accounting period.

Wherefore, if a person closes the business in one chargeable accounting period and after some time starts a new business in another chargeable accounting period, the two constitute one business under the second proviso to cl. (5) of s. 2 of the Excess Profits Tax Act, 1940, and the assessee is entitled to utilize the deficiency of profits in the latter for reducing the chargeable profits in the former, whether taxed or yet to be taxed.

Sita Ram Kayan v. Commissioner of Income-tax

103

**Execution of the Decree**—*Cash compensation attachment of—U. P. Zamindars' Debt Reduction Act, 1952, s. 9, scope of.*

*Held*, that s. 9 of the U. P. Zamindars Debt Reduction Act limits its scope by confining its benefit to those cases only where attachment and sale of bonds is asked for and it does not apply where cash compensation alone is sought to be followed in execution of a decree.

Firm Mattoo Lal Baldeo Prasad v. Shrimati Shanti Devi ... ..

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**Explanation to a section of an Act**—*Can only clarify the section and not enlarge its scope* ... ..

773

**First Information Report by Accused**—*Admissibility of statements in—Against the accused or co-accused—Code of Criminal Procedure 1898, s. 154.*

In the first information report lodged by A, it was, *inter alia*, stated that the premises, the place and cause of fighting, had been in the possession of the rival group and that M, A's son, was also present on the scene of occurrence. In the trial of A, M and others under ss. 304 and 323, Indian Penal Code made objection to the admissibility of these statements.

*Held*, (i) that the statement of A, the co-accused, could not be used in evidence against M, the relationship of father and son between them being of no consequence;

(ii) that there was no difficulty in receiving in evidence the statement on the factum of possession and it could be well used as an admission against A.

Allahdia v. State	...	...	...	499
<b>Forma Pauperis</b> —can a Limited Company, file cross-objection in <i>forma pruperis</i>	...	...	...	640
<b>Forming Union or Association</b> —By Government servants without the prior sanction of the Government or becoming members or office-holders of the same—Legality of	...	...	...	787
<b>Government Analyst's failure</b> —To give full protocols of test applied, if amounts to a fatal defect in the prosecution under Drugs Act.	...	...	...	734
<b>Government servants</b> —Formation of union of, without prior sanction of Government—Legality of such Union and consequences of its organization and membership—Government Servant Conduct Rules, 1926, rule 5-B—Manual of Government Orders, 1954, paras 95, 96 and 97—Constitution of India, Arts. 19(1), (c), (g) and (19) (6).				

There is nothing in the Manual of Government Orders or the Government Servant Conduct Rules—at any rate as it remained till November 1, 1957—to prohibit or disable Government servants from forming their union or association without the prior sanction of the Government or from becoming members or office-holders of the same. Para 96 of the aforesaid Manual in fact affirms the right of association or union guaranteed by Art. 19(1) (c) of the Constitution subject to the only condition that it is not for an unlawful purpose and para 97 in no way transgresses or limits the same.

Bhagelu v. Civil Surgeon, Jaunpur	...	...	...	787
<b>Gross negligence</b> —Of <i>guardian ad litem</i> —Remedy by a separate suit to avoid the impugned proceedings, if available to the minor	...	...	...	243
<b>Guardian ad litem</b> —Gross negligence—Minor's interest Prejudiced—Decree, setting aside of.				

Where a *guardian ad litem* of a minor party to a suit did not merely absent himself when the proceedings in the final decree in a suit for partition were taken but also failed to prefer an appeal against the final decree, which seriously prejudiced the rights of the minor, inasmuch as a substantial property which was part of the preliminary decree had been left out in the final decree without just cause, specially in the circumstances where the preliminary decree had been confirmed by the appellate court, his action amounted to gross negligence, making the final decree liable to be set aside.

Murli Manohar v. Lachhmanji	...	...	...	243
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<b>High Court</b> —Power of, to interfere with the decision of a subordinate court—under s. 115, Civil Procedure Code, 1908—How and when to be exercised ... ..	87
<b>Hindu Law</b> — <i>Joint family—Debt—Decree against father alone—Claim against son withdrawn—Execution—Son's liability—Debt not tainted—Constructive res judicata—Civil Procedure Code, 1908, O. XXIII r. 1(3), applicability of.</i>	
A son's share in a Mitakshara joint family property is liable to be attached and sold in execution of a decree against the father, although the claim against the son made a party to the suit was withdrawn, if it was not shown that the debt was not a real debt and that it was of a gambling nature and tainted with immorality. No question of constructive <i>res judicata</i> or O. XXIII, r. 1(3), Civil Procedure Code, arises in such a case.	
<b>Inder Gopal v. M/s. Bhimraj Harlal</b> ... ..	52
<b>House-tax</b> —imposition in respect of a building is justified or not—to be decided on evidence ... ..	679
<b>Identification</b> —proceedings after release of accused on bail evidentiary value of ... ..	583
<b>Income of assessee</b> —For the purpose of trade, callings and vocations tax mentioned in s. 128(1) (iii) of the U. P. Municipalities Act, 1916—What to be included and what cannot be deducted while computing ... ..	724
<b>Indian Banking Companies Act, 1949 s. 45-B</b> — <i>Member of a Committee of Inspection—Whether holds a fiduciary character in respect of the assets of the Company.</i>	

On a compulsory winding up of the respondent company, a Committee of Inspection was appointed which included the appellant as one of its members. Properties constituting assets of the respondent company were purchased *benami* for the appellant by one Roshan Lal under a conveyance executed by the Official Liquidator. The Official Liquidator after a discovery of the material facts, re-claimed the properties under s. 45-B of the Indian Banking Companies Act on the ground that the conveyance executed by him was void.

The claim having been decreed by learned Single Judge, on a special appeal. *Held*, that, the duty of a Committee of Inspection in essence, is to assist in the administration of the assets in the one case of the bankrupt and in the other of the Company in liquidation. The position of a member of a Committee of Inspection thus involves confidence so as to impress him with a fiduciary character and the liability rests not on the express provisions of the Indian Companies Act or the rules framed thereunder, but on the general and equitable principles. The transaction in favour of the appellant was consequently vitiated.

The appeal was accordingly dismissed.

Durga Prasad *v.* Official Liquidator, Banaras Bank Ltd. ... ..

**Indian Merchandise Marks Act, 1889, s. 15—Limitation—Counterfeit Trade Marks, possession of—Complaint when to be filed.**

In view of s. 15 of the Indian Merchandise Marks Act, 1889 a private prosecutor charging an accused for being in possession of counterfeit trade marks should prefer his complaint within one year of the discovery of the offence.

Dau Dayal *v.* State of Uttar Pradesh ...

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**Indian Penal Code, 1860, s. 411—Ingredients proof of—Indian Evidence Act, 1872, s. 114—Presumption, effect of.**

The applicants were convicted under s. 411, Indian Penal Code on proof of two facts, viz. (i) that a theft was committed in respect of the articles in question, and (ii) that the articles were recovered from the possession of the applicants soon after the theft. The applicants by petitions in revision contended that the conviction was unsustainable in that the prosecution had failed to prove a further necessary fact that some person other than the accused had possession of the incriminating articles before the accused got possession of it.

*Held*, that where it has been proved (i) that a theft had been committed in respect of certain property, and (ii) that that property has been recovered from the possession of the accused soon after the theft, a presumption arises under illustration (a) to s. 114, Indian Evidence Act that the accused is either the thief or receiver of stolen property, and the ingredients of an offence under s. 411, Indian Penal Code including possession of someone else at an earlier stage would be presumed to have been established. The accused will then have to rebut the presumption raised against him.

If, however, the recovery cannot be held to have been made soon after the theft the presumption under s. 114, Illustration (a) Indian Evidence Act is not available to the prosecution and it will have to prove, by direct evidence along with the other ingredients of the offence, that some person other than the accused had possession of the property before the accused got possession of it.

The applicants having failed to rebut the presumption raised against them under s. 114, Illustration (a) of the Indian Evidence Act, the facts proved against them were sufficient to warrant a conviction of the applicants.

The petitions in revision were accordingly dismissed.

Rajauwa *v.* State ... ..

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**Indian Stamp Act, 1899, s. 24—Property subject to encumbrance sold free from it—Stamp duty payment of—Interpretation of Statutes—Explanation to s. 24, Indian Stamps Act—Construction of.**

By s. 24 of the Indian Stamp Act:

"Where any property is transferred to any person. . . . subject either certainly or contingently to the payment. . . . of any money. . . . whether being or constituting a charge or encumbrance upon the property or not, such. . . . money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty.

*Explanation*—In the case of a sale of property subject to a mortgage or other encumbrance, any unpaid mortgage money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale."

Where property subject to a charge to the extent of Rs.10,00,000 was with an arrangement with the mortgagee sold for a sum of Rs.1,00,000 free from encumbrance as the mortgagee limited his charge to Rs.5,00,000 out of which a sum of Rs.3,89,000 was paid to him and the sale consideration of Rs.1,00,000 was left with the vendee to be paid to him while the payment of the balance of Rs.11,000 was promised by the vendor.

*Held*, that the property though originally subject to a charge, the sale thereof was not subject to any encumbrance and was as such not covered by s. 24 or its Explanation. Stamps duty accordingly was payable on a sum of Rs.1,00,000 only and the amount of encumbrance could not be added to it.

*Held*, further, that the words "subject to mortgage or other encumbrance" used in the Explanation to s. 24 governs the words "sale of property" and not the word "property" itself. The explanation can only clarify the section and not enlarge its scope.

Sidhnath Mehrotra v. Board of Revenue ...

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—s. 57, Sch. I—B, Art. 5(c) Reference—Indian Companies Act, 1956, s. 75(2) Particular filed in prescribed form—Agreement—Not conveyance.

An oral agreement was entered into between RS, proprietor of a business carried on under the name of Globe Travels with a company newly incorporated under the name of Messrs. Globe Travels (Private) Ltd. of which RS became the Managing Director whereunder the former agreed to transfer his business to the company in consideration of the allotment of fully paid 720 shares to him which was done and pursuant to s. 75(2) of

Indian Companies Act, 1956, particulars of the contract in the prescribed form were filed with the Registrar bearing a stamp of Rs.2 as an agreement under Art. 5(c) of Schedule I-B to the Indian Stamp Act as in force in this State. The question arose as to whether the document filed is a mere agreement or a conveyance chargeable under Art. 23 of Schedule I-B.

*Held*, that, the particulars filed by the company were duly stamped inasmuch as the contract which was admittedly made was only an agreement to transfer in future.

Raj Sachdeva v. Board of Revenue ... 652  
 —s. 61—*Reference Document—Promissory note or bond.*

The question arose whether a document which ran as follows was a promissory note or a bond:

"On demand I promise to pay at Gonda to the Court of Wards, Utraula, Bilaspur State, district Gonda, the sum of Rs.1,50,000 with interest at 3 per cent per annum for value, received by me on 5th July, 1951."

*Held*, that the document was a bond and not a promissory note and was chargeable with a duty of Rs.1,406-4 as the duty stood on the date of execution.

Mohammad Mustafa Ali Khan v. Rani Raj Rajeshwari Devi ... 668

**Interest**—of minor—Prejudiced through gross negligence of the *guardian-ad-litem*—Remedy by a separate suit to avoid the impugned proceedings, if available to the minor ... 243

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**Iron and Steel (Control of Production and Distribution) Order, 1941, s. 11-B (3)**—*Not ultra vires—Report not analogous to change—Not to contain that minute detail.*

Section 11-B (3) of the Iron and Steel (Control of Production and Distribution) Order, 1941 is not *ultra vires*.

A report under s. 11 of the Order is to contain only the "facts constituting the offence" and is not to take the place of the "charge" and should not contain every minute detail which is to be, subsequently mentioned in the charge to be framed against the accused.

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<b>Judicial declaration</b> —Of unconstitutionality of a statute—If, annuls or repeals the same—The court simply refuses to recognize it, and determines rights as if such statute had no application ... ..	293
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<b>Land Acquisition Act, 1894, s. 18</b> — <i>Reference—Collector, power of—Rejection or refusal—Conditions, fulfilment of.</i>	
Where an application is made to a Collector under s. 18 of the Land Acquisition Act, 1894, requiring that the matter be referred for the determination of the Court it is open to him to reject the application and to refuse to make a reference if the required conditions have not been complied with.	
Panna Lal v. Collector, Etah ... ..	628
———s. 23(1)—Added by sub-cl. (3) of cl. 10 of the Schedule to the U. P. Town Improvement Act, 1919—Provisions of, involve no discrimination, contravening the provisions of Art. 14 of the Constitution of India, 1950 ... ..	278
<b>Landlord</b> —Who applied under the U. P. Encumbered Estates Act, 1934, can sue the mortgagee in possession for profits between the application under s. 4 and the decree under s. 14(7)—Such a suit not barred by the said Act or the Code of Civil Procedure, 1908—Limitation: six years under Art. 120, Indian Limitation Act, 1908 ... ..	265
<b>Landlord and Tenant</b> — <i>Ejectment—Arrears of rent—United Provinces (Temporary) Control of Rent and Eviction Act, 1947, s. 3(1) (a) as amended by Act of 1954 scope of.</i>	
<i>Held</i> , that the (1954) amendment of clause (a) of s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 did	

not affect the maintainability of suits for eviction filed prior to the amendment, if at the time they were instituted the necessary condition then required by cl. (a) of s. 3 was fulfilled and it cannot be held that the amendment in cl. (a) of sub-s. (1) of s. 3 by the Act of 1954 was retrospective in operation or required pending suits to be decided in accordance therewith.

Sharafat Ullah Khan v. Raja Udairaj Singh ... 565

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**Maintainability**—Of suit for recovery of profits from the mortgagee in possession by the landlord who had applied under the U. P. Encumbered Estates Act, 1934, for the period between the application under s. 4 and the decree under s. 14(7)—Not barred by the said Act, or the Code of Civil Procedure, 1908—Limitation: six years under Art. 120, Indian Limitation Act, 1908 ... 265

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P. N. Chowdhry, the petitioner, was the Additional Government Advocate in the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, even prior to the 16th April, 1957 and he received a notification on the 18th April, 1957, that he was reappointed as Additional Government Advocate, Lucknow Bench, Lucknow, for a further period of 3 years from 16th April, 1957. The petitioner was governed by U. P. Law Officers' Rules, 1942, which do not lay down any age-limit. By a notification dated 20th December, 1957, rule 7 of the U. P. State Law Officers' Rules was amended and a new rule provided for superannuation at the age of 60 years. The petitioner was to attain the age of 60 years on 25th August, 1958, and in July, 1958 on hearing the rumour that the appointment of an Additional Government Advocate was in contemplation, he submitted to the Hon'ble Minister of Justice, U. P., that the new rule 7 did not apply to him and he also submitted a written representation to that effect. On 10th September, 1958, he was informed by the State that term of appointment as Additional Government Advocate expired on 25th August, on his attaining the age of 60 years but the Governor was pleased to allow him to work till an order is passed on his representation. On 24th September, 1958 he was informed by the State that his representation was rejected and that Sri D. P. Uniyal has been appointed as an Additional Government Advocate in his place from 1st October, 1958, and that the petitioner should make over charge to him.

The petitioner has filed a writ petition against the order of the 24th September, 1958.

*Held*, (i) that the petitioner cannot be deemed to be a member of the Civil Service of the State of U. P. but he is holding a Civil post within the meaning of Article 311 of the Constitution of India.

(ii) that if the new rule 7 does not apply to the case of the petitioner, the petitioner's removal before the expiry of the period of 3 years for which he had been appointed would amount to a punishment or would be a removal within the meaning of Article 311(2) of the Constitution of India. No opportunity was given to the petitioner before the service of the petitioner was terminated.

(iii) that a statute should not be so construed as to take away or extinguish the right of any person unless it appears by

express words or by plain implication that it was the intention of the Legislature. Clear terms ought to be used if it is intended to divest a vested right.

(iv) that there is nothing in the language of the new rule 7 which makes it retrospective in its application and the rights of the petitioner are not affected by this rule and the petitioner has a right to continue as an Additional Government Advocate for a further period of 3 years from 16th April, 1957.

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**Master and Servant**—*Servant overstating the weights of carts—Duty of the servant vicarious liability of the Master—Mens rea not essential—U. P. Sugarcane Regulations of Supply and Purchase Rules, 1954, rule 96(1) (f) and U. P. Sugarcane Regulation of Supply and Purchase Act, 1953, s. 22, scope of.*

Ram Sunder Lal the weighment clerk of the Nawabganj Sugar Mills overstated the weights of the empty carts in order to secure wrongful gain for Tharoo Lal who is the occupier of the above sugar mill. Both were convicted under s. 22 of the U. P. Sugarcane (Regulation of Supply and Purchase) Act of 1953 for a breach of rule 96 (1) (f) of the U. P. Sugarcane (Regulation of Supply and Purchase) Rules of 1954.

*Held*, that an offence under the U. P. Sugarcane (Regulation of Supply and Purchase) Act comes under those limited class of offences in which *mens rea* is not an essential element.

(ii) further that it is open to the legislature to absolutely prohibit any act and make an offender vicariously liable within the framework of the Constitution of India.

(iii) that if the occupier of the Mill prefers to perform his duty (of taking the weights of the vehicle in which the case is brought) vicariously through a servant he can also be held vicariously responsible if the servant commits a breach.

(iv) also that it is the duty of the occupier to see that the weights of vehicles are rightly and correctly taken.

(v) that illegal act charged against, both the accused was one which was within the scope of the servant's duty and so the master can be held to be vicariously liable for the fault committed by the servant.

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**Member**—Of committee of inspection, constituted under s. 178, Indian Companies Act—Holds a fiduciary character in respect of the assets of the company in liquidation

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**Mens rea**—If an essential element in an offence under the U. P. Sugarcane (Regulation of Supply and Purchase) Act

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**Mesne Profits**—*Decree for the recovery of—Construction of—Period for which recoverable—Computation of the period*



*from and up to which it may be recovered—Code of Civil Procedure, 1908, s. 2(12), O. XX, r. 12.*

The respondents, claiming under a lease which expired on 31st October, 1941, instituted a suit against the appellant, the lessor, for the recovery of possession of the plot in dispute and for mesne profits. The suit was decreed on 2nd January, 1935 and the decree directed payment of pendente lite future mesne profits at a certain rate until delivery of possession. The decree was affirmed in appeal except for an enhancement in the rate of mesne profits. The second appeal was summarily dismissed by the High Court sometime in the year 1939. Putting the decree into execution, the respondents claimed mesne profits in terms of the decree.

*Held*, (i) that the decree should, in view of the express provisions of O. XX, r. 12(1) (c), be construed as an award of mesne profits up to a maximum of three years from the date of the decree.

(ii) that the date of the decree for the purpose of computing the period of three years will be the date when the decree becomes final which, in this case, would be the date of the High Court's order and not that of the trial court's decree.

(iii) that although three years from the High Court's order would extend up to sometimes in 1942, the mesne profits could be recovered only up to 31st October, 1941, the date of the expiry of lease, when the appellant must be deemed to have obtained notional possession or whereafter the appellant's possession became lawful.

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**Minor**—Interest of, prejudiced through gross negligence of the guardian-ad-litem—remedy by a separate suit to avoid the impugned proceedings, if available to the minor ...

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**Municipalities**—*Trade, Callings and Vocations Tax—Assessable income—Dearness Allowance, exemption of—Payment towards General Provident Fund and Contributory Provident Fund and payment to the Insurance Company, deduction of—U. P. Municipalities Act, 1916, s. 128 (i) (iii), assessable income, scope of.*

A notification no. 2493/XXIII—57(47-48) was published in the *United Provinces Gazette*, dated April 30, 1949 and it runs as follows:

"It is hereby notified under section 135(2) of the United Provinces Municipalities Act, 1916 that the Municipal Board of Sitapur in exercise of the powers conferred by section 128(1) (iii) of the said Act, has imposed with effect from May 1, 1949 a tax on the inhabitants of the Sitapur Municipality at the following rates:

On income from Rs.301 to Rs.600 at annas 8 per cent per annum.

On income from Rs.601 to 999 at annas 12 per cent per annum.

On income from Rs.1,000 and above at Re.1 per cent per annum.

Subject to a maximum of Rs.50.

NOTE—(1) Income means income earned or arising within the Municipality.

(2) Property assessed to house tax under section 128(1) (i) of the said Act shall be exempt from the tax.

*Held*, that the sum of Rs.30 which the assessee is receiving as dearness allowance may be included while computing his income for the purpose of trade, callings and vocations tax mentioned in s. 128(1) (iii) of the U. P. Municipalities Act, 1916.

*Held*, also that the amounts paid by the assessee towards the General Provident Fund and the Contributory Provident Fund and also the amount paid as premiums to the National Insurance Company cannot be deducted from the income of the assessee while computing his assessable income for the purpose of trade, callings and vocations tax mentioned in clause 3 of s. 128 of the U. P. Municipalities Act, 1916.

Shambhoo Nath Tandon v. Municipal Board,  
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**Negligence**—of the *guardian-ad-litem*, prejudicing interest of the minor—Remedy by a separate suit to avoid the impugned proceedings, if and when available to the minor ...

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**Notification**—Under s. 5(1) of the United Provinces Muslims Waqfs Act, 1936, declaring a particular property to be a waqf under the Act—What it should contain ...

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**Objection**—To want of jurisdiction in subordinate Court or authority—When and where to be taken to justify relief in writ proceedings—Failure to do so before the subordinate authority, if and when fatal—Such an omission, however, cannot, on the other hand, be pressed for the first time in special appeal ...

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**Parliament and Legislatures of States**—Powers of and limitations of the respective bodies to make laws, as governed by the Constitution of India, 1950 ...

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 So much of s. 29 of the Indian Arms Act as authorizes the prosecution for the offence under s. 19(f) of that Act without the previous sanction of the District Magistrate, if the offence is committed within the area to which s. 32(2) of the Indian Areas Act applies as distinguished from the rest where such sanction is necessary, transgresses the constitutional guarantee of 'equality' before the law and, to that extent, became void after the coming into force of the Constitution.  
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A private carrier's permit being for the carriage of goods for or in connection with the trade or business carried on by the owner, it is necessary to judge and see whether the goods in question answer that description. The imposition of a condition regarding goods permitted for carriage may, therefore, be a reasonable restriction and there is nothing wrong in s. 53(2) of the Motor Vehicles Act which authorizes the same. The prohibition, however, against carrying empty used *bardana* and empty used tins of his own is not a reasonable restriction and is, therefore, invalid.

Rule 94 of the United Provinces Motor Vehicles Rules is valid but does not authorize the imposition of a condition for maintaining and furnishing a log book. Such a condition may, of course, be laid down under s. 53(2) of the Act and should be shown against item nos. 8 and not 9 of the permit.

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**Proportional representation system by means of the single transferable vote**—Election of President under U. P. Municipalities (Conduct of Election of Presidents and Election Petitions) Order, 1950—Two continuing candidates securing equal votes—Result by lot ...

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**Probationer**—In U. P. Civil Service—Status of, after expiry of the probationary period—Power of extending period of probation thereafter cannot be exercised retrospectively—If appointed in clear vacancy, acquires a lien on the post—Absence of increment in salary after efficiency bar or of specific order of confirmation insufficient by itself to extend the probationary period— ...

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**Rehearing of Criminal Revision**—Power of High Court to revoke, review, recall or alter its own earlier decision—If and when permissible ...

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**Report**—Under s. 11, Iron and Steel (Control of Production and Distribution) Order, 1941—To recite facts constituting the offence and not to contain every minute detail the subsequent "charge" against the accused bears ...

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**Representation of the People Act, 1951, s. 117—Election petition dismissed—Remand ordered—same Tribunal to try jurisdiction—Reference to Election Commission not necessary.**

An election petition dismissed on the ground of non-compliance with the provisions of s. 117 of the Representation of the People Act, 1951 is on remand to be tried by the same Election Tribunal if he is still available and it is not necessary that the matter be referred to the Election Commission for starting the proceedings afresh in accordance with the provisions of s. 86 of the Act. The particular individual having already been appointed by the Commission to try the election petition has jurisdiction to continue the trial and to conclude it according to law.

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**Review—High Court cannot be compelled by State—Enactment to review its previous order passed under Art. 226 of the Constitution of India ... 662**

**Sale—Arrears of Income Tax—Sale by Tahsildar—Sale Certificate and possession issued by the Tahsildar—Sale Certificate, validity of—U. P. Land Revenue Act, 1901, ss. 174, 177 and 233(1) (m), scope of.**

Held, (i) that where there are arrears of income-tax against an assessee, they would be realisable as arrears of land revenue, the procedure for recovery of such arrears is provided in ss. 154, 174 and 177 of the United Provinces Land Revenue Act.

Where a house is sold for arrears of income-tax and the circumstances indicate that the Collector had not put the purchaser into possession of the property and the sale certificate itself was not issued by the Collector but it was issued by the Tahsildar who was not competent to perform the act, the sale must be regarded as nullity in the eye of law, illegal and void.

(ii) that in a case of sale for arrears of income-tax the sale is to be confirmed by the Commissioner of sale by the court of Tahsildar was *ultra vires*, null and void and cannot convey any title in the property sold.

(iii) that s. 177 authorises the Collector and the Collector alone to issue such a certificate and does not make any provision for delegation of his power in this regard by him and where the sale certificate is issued by the Tahsildar there is a clear contravention of the mandatory provisions of law and the document in question does not comply with the requirements of s. 177 of the United Provinces Land Revenue Act.

(iv) that it is difficult to invoke illustration (1) of s. 114 of the Indian Evidence Act for the purpose of holding that the act itself was regularly performed when the regular performance of the official act is not proved.

Section 233 (1) (m) of the United Provinces Land Revenue Act indicates that it is the plaintiff who is barred from instituting a suit on the ground envisaged in that section. The section is not meant to cover a plea of a defensive nature at all.

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**Succession or transfer of land in a village**—*Obligation to report the same to the Panchayati Adalat concerned—Scope of—United Provinces Land Revenue Act, 1901, ss. 34(1) and 34(5).*

Section 34(1) of the United Provinces Land Revenue Act as amended by the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 imposing a duty on the successor or transferee of land in a village to report the same to the Panchayati Adalat concerned is prospective in operation and restricted to cases where possession of land has been obtained by virtue of such devolution.

The bar under s. 34(5) of the said Act against the entertainability of any suit or application in a Revenue Court until the aforesaid report has been made would not, therefore, operate against a person who succeeded before 1st July, 1952 or who had not acquired actual possession of the land in question.

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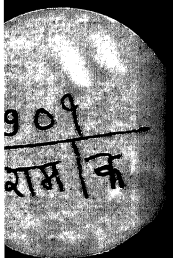
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# THE INDIAN LAW REPORTS ALLAHABAD SERIES

## APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal.*

DURGA PRASAD AND ANOTHER (APPELLANTS)

*v.*

1958  
September

OFFICIAL LIQUIDATOR BANARAS BANK, LTD.  
(IN LIQUIDATION) (RESPONDENT)

**Indian Banking Companies Act, 1949, s. 45B—Member of a  
Committee of Inspection—Whether holds a fiduciary character  
in respect of the assets of the company.**

On a compulsory winding up of the respondent company, a Committee of Inspection was appointed, which included the appellant as one of its members. Properties constituting assets of the respondent company were purchased *benami* for the appellant by one Roshan Lal under a conveyance executed by the Official Liquidator. The Official Liquidator after a discovery of the material facts, reclaimed the properties under s. 45B of the Indian Banking Companies Act on the ground that the conveyance executed by him was void.

The claim having been decreed by a learned single Judge, on a special appeal: *Held*, that, the duties of a Committee of Inspection in essence, is to assist in the administration of the assets in the one case of the bankrupt and in the other of the Company in liquidation. The position of a member of a Committee of Inspection thus involves confidence so as to impress him with a fiduciary character and the liability rests not on the express provisions of the Indian Companies Act or the rules framed thereunder, but on the general and equitable principles. The transaction in favour of the appellant was consequently vitiated.

The appeal was accordingly dismissed.

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 —

Special Appeal No. 214 of 1956 against the decision of, Company Judge, dated the 26th July, 1956, in Company Case, No. 24 of 1953.

The facts appear in the judgment.

*Brij Lal Gupta*, for the appellant.

*A. Sanyal*, for the respondent.

The judgment of the Court was delivered by—

MOOTHAM, C.J.:—This is an appeal from an order of the learned Company Judge, dated the 26th July, 1956. The facts so far as they are relevant for the purpose of this appeal are these: On the 1st July, 1940, an order was made for the compulsory winding up of the Banaras Bank, Ltd., and thereafter a Committee of Inspection was appointed pursuant to the provisions of section 178 of the Indian Companies Act, 1913. The assets of the Bank included two houses, one at Saharanpur which the Bank had purchased in the year 1934 for Rs.9,200 and the other house at Hardwar which the Bank had purchased in the same year for Rs.16,000. On the 17th February, 1941, an offer was received from one Roshan Lal of Rs.18,000 for these two houses. The offer was laid before the Committee of Inspection which, on the 19th March, 1941, resolved that the Official Liquidator should endeavour to get the offer increased to Rs.20,000, but if he did not succeed in doing so, he should accept the offer of Rs.18,000. Sri Roshan Lal refused to increase his offer, and on the 1st April, 1941, the Official Liquidator reported to the Company Judge that the offer made of Rs.18,000 was fair and should be accepted. On the 4th April, 1941, the Court sanctioned the proposed sale, and on the 2nd August of that year a conveyance of the two houses was executed by the Official Liquidator in favour of Sri Roshan Lal.

In the year 1952 the Official Liquidator ascertained that on the 6th October, 1942, Sri Roshan Lal had executed a deed relinquishing his right, title and interest

in the two houses in favour of Sri Durga Prasad, a member of the Committee of Inspection, and that in this deed it was recited that Sri Durga Prasad was the real owner of the houses which had been purchased *benami* by Sri Roshan Lal "for certain reasons." Thereafter an application was made to the Court by the Official Liquidator under section 45B of the Banking Companies Act for a declaration that the conveyance executed by the Official Liquidator in favour of Sri Roshan Lal on the 2nd August, 1941, be declared void and that Sri Durga Prasad be directed to surrender and transfer the two properties to the Official Liquidator and deliver to the latter all documents of title relating thereto; in the alternative, it was prayed that Sri Durga Prasad be directed to pay to the Official Liquidator a sum of Rs.7,200 and such further sum as this Court might deem fit. The learned Company Judge by the order which is the subject of the present appeal directed Sri Durga Prasad to transfer the two houses to the Official Liquidator on repayment to him by the latter of the original purchase price of Rs.18,000.

Sri Durga Prasad and Sri Roshan Lal now appeal. Two arguments have been advanced on their behalf. The first is that the original purchase of the two houses by Roshan Lal was not in fact a *benami* transaction. This argument was not strongly pressed and we agree with the learned Judge that in view of the pleadings, it is not an argument now open to the appellants. A reply was filed by Sri Durga Prasad to the Official Liquidator's application and was adopted by Sri Roshan Lal. In paragraph 4 of his reply Sri Durga Prasad says—

"Accordingly for the purposes of the present proceedings it may be assumed that the transaction was *benami* without prejudice to the right of the opposite party to claim a decision of the real character of the transaction in regular proceedings."

In our opinion that statement concludes the matter.

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The second argument is that Sri Durga Prasad, although a member of the Committee of Inspection at all material times, did not stand in any fiduciary relation to the company's assets and was accordingly at liberty to purchase the assets through a third party without making any disclosure to the Liquidator or other members of the Committee.

Now it is not seriously disputed that under the English Law a member of a Committee of Inspection is in the position of a trustee for sale, but it has been argued that under Indian Law the position is different. Our attention has been invited to certain differences in the powers vested in the liquidator in a compulsory winding up under the Indian Companies Act, 1913, and the English Companies Act of 1948, to be found in sections 179 of the former and 245 of the latter. Reliance has also been placed upon differences between rules 161 and 163 of the Companies (Winding up) Rules, 1949, and rules 65, 82 to 86, 110 and 129 of the Companies Rules to be found in Chapter 28 of the Rules of Court. These latter rules, however, came into force only in 1952 and those which they replaced contained no rules corresponding to those to which reference was made by learned counsel. They did, however, contain a rule, rule 104, which provided that—

"In cases not provided by these rules or by rules of procedure laid down in the Act the practice and procedure of the High Court of Justice in England in matters relating to companies shall be followed so far they are applicable and not inconsistent with these rules and the Act."

Such differences as there were between the powers of a liquidator in a compulsory winding up under the English and Indian Acts are not in our opinion material, and we do not think it necessary to refer to them in detail. What is important is that a Committee of Inspection is appointed under the Indian Act, as it is under

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the English Act, "to act with the liquidator": See s. 178A (1) of the Indian Act and s. 252(1) of the English Act.

The argument for the appellants in substance is that no disabilities attach to members of a Committee of Inspection except such as are specifically provided for in the Companies Act or Rules. We are unable to accept this view. In our opinion the liability of a member of a Committee of Inspection rests not on the express provisions of the Act or Rules but is founded on general equitable principles. This is, we think, made clear in *re Bulmer, Greaves v. Inland Revenue Commissioners* (1). The Court of Appeal in that case considered the position of a member of a Committee of Inspection under the Bankruptcy Act. The Court pointed out that Bankruptcy Rules Nos. 347 and 348, which correspond to Winding-up Rules 161 and 163 on which reliance has been placed by the appellants, are not intended to be exhaustive but are directed merely to providing a convenient administrative method of dealing with the particular problems that the rules concern. At page 327 of the report, Lord Wright, M. R., observes:

"Under the Bankruptcy Act, 1914, s. 20, provision is made for the creditors qualified to vote, at their first or any subsequent meeting by resolution, to appoint a Committee of Inspection for the purpose of superintending the administration of the bankrupt's property by the trustee. That means that they are appointed for the purpose of carrying out, or rather assisting the trustee in carrying out, the administration and the realization of the insolvent's property, and they are, therefore, in the position of trustees for sale. Now, taking that definition of their functions and their duties, it would appear, on general equitable principles, that they

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would be like any other trustees in that position, debarred from buying, or trafficking in the trust property."

By s. 20 of the English Bankruptcy Act, 1914, a Committee of Inspection is appointed for the purpose of superintending the administration of the bankrupt's property by the trustee in bankruptcy. The purpose of the appointment of a Committee of Inspection under the Indian Companies Act is, as we have already pointed out, "to act with the liquidator", (s. 178). Section 183 of the Act of 1913 then provides that subject to the provisions of that Act, the Official Liquidator of a Company which is being wound up by the Court shall in the administration of the assets of the Company and in the distribution of those assets among the creditors have regard to, *inter alia*, any directions that may be given by the Committee of Inspection, subject to the proviso that if there be a conflict in the directions given by the directors or the contributories at a general meeting and those given by the Committee of Inspection, the former shall prevail. The duties of a Committee of Inspection under the Companies Act bear, therefore, a close similarity to those of a Committee of Inspection under the Indian Bankruptcy Act. Its duty in essence is to assist in the administration of the assets in the one case of the bankrupt and in the other of the company in liquidation. The position held by a member of a Committee of Inspection involves confidence so as to impress him with a fiduciary character. In our opinion the position of a member of a Committee of Inspection under the Companies Act differs in this respect in no way from that of his counterpart under the English Bankruptcy Act.

It is said in the case before us that Sri Durga Prasad paid a fair price for the property, but that fact is immaterial for, as is said in Lewin on Trusts, 15th Ed.,

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page 564, in a passage quoted by Lord Wright in *Bulmer's case* (1):

"The rule is now universal, that, however, fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property."

In our opinion the facts in this case show that Sri Durga Prasad knew quite well that he was not entitled to purchase the assets of the company without making a full disclosure and that it was for that reason that he bought the property in the name of Sri Roshan Lal.

In our opinion the learned Judge was right in holding that the Official Liquidator is entitled to the return of the property.

It has been urged for Durga Prasad that, according to his statement made before the learned Company Judge, he has made substantial improvements to the property and that he is entitled to reasonable compensation therefor. This question was not raised in his written statement, no issue was framed with regard to it, and the Liquidator in the circumstances adduced no evidence with regard either to the alleged improvements or to what would amount to fair compensation for them. In the circumstances, we are of opinion that the question of compensation for improvements should be the subject matter of separate proceedings, if Sri Durga Prasad is so advised; and that no order about this matter can be made in this appeal.

The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

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## SUPREME COURT

## APPELLATE CIVIL

Before Mr. Justice Aiyar, Mr. Justice Gajendragadkar  
and Mr. Justice Sarkar

SIRAJ-UL-HAQ KHAN AND OTHERS (APPELLANTS)

v.

THE SUNNI CENTRAL BOARD OF WAQF, U. P.,

AND OTHERS (RESPONDENTS)

1958  
September,  
16.

[ON APPEAL FROM THE HIGH COURT AT  
ALLAHABAD].

United Provinces Muslim Waqfs Act, 1936, ss. 5(2), 53—  
*Waqf*—“Any person interested in a waqf”, meaning of—*Suit*  
for declaration that properties not waqf—*Limitation*—*Pro-*  
*visions of limitation*—*Construction*—*Notice under s. 53,*  
*necessity of*—*Limitation Act, 1908, s. 15 applicability of.*

The expression “any person interested in a waqf” in s. 5(2)  
of the United Provinces Muslim Waqfs Act, 1936, is not to be  
strictly or literally construed but it should be taken to mean  
any person interested in a transaction which is held to be a  
waqf..

A suit, brought by the members of the Waqf Committee  
claiming a declaration that the properties in suit were not  
covered by the provisions of the U. P. Muslim Waqfs Act,  
1936, and injunction against the Sunni Central Board of Waqf  
on the allegations that the properties in suit are outside the  
operative provisions of the Act and that the Board has acted  
illegally and without jurisdiction in assuming authority over  
the management of the said properties, is governed by s.  
5(2) of the Act, and is barred by time, if not brought within  
a year, unless it is saved under s. 15 of the Limitation  
Act, inasmuch as such plaintiffs are admittedly interested in  
the waqf, even if the words “any person interested in a waqf”  
are literally and strictly construed.

In construing the provisions of limitations, though they are  
to some extent arbitrary and frequently lead to hardship,  
equitable considerations are immaterial and irrelevant and in  
applying them effect must be given to the strict grammatical  
meaning of the words used by them. Where an order in a  
previous litigation cannot be construed as an order or an in-  
junction staying the institution of a suit, the suit subsequently  
filed does neither infringe the earlier order even indirectly or  
remotely, nor attract the provisions of s. 15 of the Limitation  
Act.

Section 53 of the U. P. Muslim Waqfs Act, 1936, applies  
to suits against a Central Board in respect of their acts as well  
as to suits for any relief in respect of any waqf. Offerings by



devotees need not be notified under s. 5(1) of the Act.

Case-law discussed.

Civil Appeal No. 121 of 1955 from a judgment and decree, dated the 22nd April, 1953/24th February, 1954, of the Allahabad High Court, (Lucknow Bench), in First Civil Appeal No. 50 of 1947.

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The facts appear in the judgment.

S. K. Dar, Senior Advocate, (*Ch. Akhtar Husain* and *C. P. Lal*, Advocates, with him) for the appellants.

*Ch. Niyamatullah*, Senior Advocate, (*Onkar Nath Srivastava*, Advocate and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of M/s. *Rajinder Narain & Co.*, with him) for the respondent No. 1.

The judgment of the Court was delivered by—

GAJENDRAGADKAR, J.:—The suit from which this appeal arises relates to a shrine and tomb known as Dargah Hazarat Syed Salar Mahsood Ghazi situated in the village of Singha Parasi and properties appurtenant to it. The plaintiffs who have preferred this appeal are members of the Waqf Committee, Dargah Sharif, Bahraich, and, in their suit, they have claimed a declaration that the properties in suit were not covered by the provisions of the United Provinces Muslim Waqfs Act (U. P. Act XIII of 1936), (hereinafter described as the Act). The declaration, the consequential injunction and the two other subsidiary reliefs are claimed primarily against respondent 1, the Sunni Central Board of Waqf, United Provinces of Agra and Oudh. Two trustees who did not join the appellants in filing the suit are impleaded as *pro forma* defendants 2 and 3 and they are respondents 2 and 3 before us. It appears that respondent 1 purported to exercise its authority over the properties in suit under the provisions of the Act and that led to the present suit which was filed on October 18, 1946, (No. 25

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of 1946). The appellants' case is that the properties in suit are outside the operative provisions of the Act, and not subject to the jurisdiction of respondent no. 1, and so according to the appellants, respondent 1 has acted illegally and without jurisdiction in assuming authority over the management of the said properties. That is the basis of the reliefs claimed by the appellants in their plaint.

The appellants' claim was resisted by respondent 1 on several grounds. It was alleged that the properties in suit did form a waqf as defined by the Act and were covered by its operative provisions. It was urged that respondent 1 was a duly constituted Sunni Central Board and it was authorised to exercise supervision over the management of the said waqf. The case for respondent 1 also was that the appellants' suit was barred by limitation and was incompetent inasmuch as before the filing of the suit the appellants had not given the statutory notice as required by section 53 of the Act.

On these pleadings several issues were framed by the learned trial judge; but the principal points in dispute were three:

- (1) Are the properties in suit governed by the Act?
- (2) Is the suit in time? and
- (3) Is the suit maintainable without notice as required by section 53 of the Act?

The learned trial judge held that the properties in suit cannot be held to be waqf as defined by the Act. In his opinion it was not the village Singha Parasi but its profits free from land revenue that had been granted in trust for the shrine and its khadims; and since the usufruct of the profits was subject to the condition of resumption and since the profits had not been vested in the Almighty, the grant cannot be construed to be a waqf as contemplated by Muhammadan Law. On the question of limitation the learned judge held that section 5(2) of the Act

applied to the suit; but, according to him, though the suit was filed beyond the period of one year prescribed by the said section, it was within time having regard to the provisions of section 14 of the Limitation Act. The plea raised by respondent 1 under section 53 of the Act was partly upheld by the learned trial judge; he took the view that the first three reliefs claimed by the appellants were barred but the fourth was not. In the result the learned judge granted a declaration in favour of the appellants to the effect that "the shrine in question together with its attached buildings and the Chharawa were not waqf properties within the meaning of the Act". As a consequence, an injunction was issued restraining respondent 1 from removing or dissolving the committee of management of the appellants and respondents 2 and 3 "not otherwise than provided for under section 18 of the Act in so far as the management and supervision of those properties are concerned in respect of which the appellants were not being granted a decree for a declaration sought for by them in view of the absence of the notice under section 53 of the Act". The rest of the appellants' claim was dismissed. This decree was passed on April 15, 1947.

Against this decree respondent 1 preferred an appeal in the High Court of Judicature at Allahabad, (Lucknow Bench), and the appellants filed cross-objections. The High Court has reversed the finding of the trial court on the question as to the character of the properties in suit. According to the High Court, the said properties constituted waqf as defined by the Act. The High Court has also held that the suit filed by the appellants was barred by limitation and was also incompetent in view of the fact that the statutory notice required by section 53 of the Act had not been given by the appellants prior to its institution. As a result of these findings the appeal preferred by respondent 1 was allowed, the appellants'

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cross-objections were dismissed, the decree passed by the trial court was set aside and the appellants suit dismissed, (April 22, 1953). The appellants then applied for and obtained a certificate from the High Court to prefer an appeal to this Court under Art. 133 of the Constitution. That is how this appeal has come to this Court.

Though the dispute between the parties raises only three principal issues, the facts leading to the litigation are somewhat complicated; and it is necessary to mention them in order to get a clear picture of the background of the present dispute. It is believed that Syed Salar Mahsood Ghazi was a nephew of Muhammad Ghazni and he met his death at the hands of a local chieftain when he paid a visit to Bahraich. On his death his remains were buried in village Singha Parasi by his followers and subsequently a tomb was constructed. In course of time this tomb became an object of pilgrimage and veneration. *Urs* began to be held at the shrine every year and it was attended by a large number of devotees who made offerings before the shrine. It is partly from the income of these offerings that the tomb is maintained. Certain properties were endowed by the Emperors of Delhi in favour of this tomb and accretions were made to the said properties by the savings from the income of the endowed properties and the offerings brought by the devotees.

The tomb was managed by a body of persons known as Khuddams of the Dargah. This body had been looking after the Dargah and the performance of ceremonies and other services at the shrine. Whilst the management of the Dargah was being thus carried on, Oudh came to be annexed in 1856 and the proclamation issued by Lord Canning confiscated all private properties and inams in the said State. The properties attached to the Dargah were no exception. Fresh settlements were, however, subsequently made by the Government as a result of which previously existing rights were revived

usually on the same terms as before. This happened in regard to the properties appertaining to the Dargah.

It would appear that in 1859 or 1860 a Sanad had been granted to Fakirulla who was the head of the khadims in respect of rent-free tenure of the village Singha Parasi. The grantee was given the right to collect the usufruct of the village which was to be appropriated towards the maintenance of the Dargah. The grantee's son Inayatulla was apparently not satisfied with the limited rights granted under the Sanad and so he brought an action, Suit No. 1 of 1865, claiming proprietary rights in the said properties. Inayatulla's suit was substantially dismissed on November 11, 1870, by the Settlement Officer. It was held that the proprietary rights of the Government in respect of the properties had been alienated for ever in favour of the charity and so the properties were declared to vest in the endowment. Inayatulla's right to manage the said properties under the terms of the grant was, however, recognized. Soon after this decision, it was brought to the notice of the Chief Commissioner in 1872 that the khadims at the Dargah were mismanaging the properties of the Dargah and were not properly maintaining the Dargah itself. On receiving this complaint a committee of Mussalmans was appointed to examine the affairs of the Dargah and to make a report. The committee submitted its report on February 20, 1877, and made recommendations for the improvement of the management of the Dargah and its properties. According to the committee, it was necessary to appoint a jury of five persons including two khadims to manage the Dargah and its properties. Meanwhile some of the lands appurtenant to the Dargah had been sold and offerings made by the devotees as well as other properties had become the subject matter of attachment. In the interest of the Dargah, Government then decided to take possession of the properties under the provisions of Pensions Act, (XXIII of 1871).

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This decision was reached after the Government had considered the report made by the Deputy Commissioner on August 31, 1878. The result of declaring that the properties were governed by the provisions of the Pensions Act was to free the properties from the mortgages created by the khadims. The management of the Dargah and its properties by the Government continued until 1902.

During this period Inayatulla attempted to assert his rights once more by instituting a suit in the civil court in 1892. In this suit Inayatulla and two others who had joined him claimed possession of the Dargah together with the buildings appurtenant thereto and village Singha Parasi. Their claim was decreed by the trial court; but on appeal the said decree was set aside on July 20, 1897. The appellate court of the Judicial Commissioner held that Inayatulla's allegation that the proprietary interest in the properties vested in him was not justified. Even so, the appellate court observed that it was not proper or competent for the Government to interfere in the management of the waqf and its properties; the Dargah was a religious establishment within the meaning of Religious Endowments Act, (XX of 1863), and the assumption of the management of the Dargah and its properties was unauthorised and improper.

As a result of these observations the Legal Remembrancer to the Government of the United Provinces of Agra and Oudh filed a suit, No. 9 of 1902, under section 539, (present section 92), of the Code of Civil Procedure. This suit ended in a decree on December 3, 1902. By the decree the properties in suit were declared "to vest in the trustees when appointed". The decree further provided for a scheme for the management of the Dargah and its properties. The scheme thus framed came into operation and the trustees appointed under it began to manage the Dargah and its

properties. The scheme appears to have worked smoothly until 1934. In 1934 Ashraf Ali and others claimed, (Suit No. 1 of 1934), that an injunction should be issued restraining the defendants from taking part in the management of the affairs of the Dargah. The plaintiffs also prayed that the defendants should be prohibited from spending monies belonging to the waqf on frivolous litigations due to party feelings. On May 7, 1934, the learned District Judge expressed his regret that animosity and party feelings should find their way in the management of a trust and issued an order directing the defendant committee that no money out of the Dargah funds should be spent either in the litigation pending before him, or in any other litigation, without the sanction of the court.

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For nearly six years after the date of this order the Dargah and its properties appear to have been free from any litigation. This peace was, however, again disturbed in 1940, when a suit was filed, (No. 1 of 1940), with the sanction of the Advocate General by five plaintiffs against the managing committee and its trustees for their removal and for the framing of a fresh scheme. On October 16, 1941, the suit was decreed. The managing committee and the trustees, however, challenged the said decree by preferring an appeal to the Chief Court. Their appeal succeeded and on March 7, 1946, the decree under appeal was set aside, though a few minor amendments were made in the original scheme of management.

Whilst this litigation was pending between the parties, the United Provinces Muslim Waqfs Act, (U. P. Act XIII of 1936), was passed in 1936 for better governance, administration and supervision of the specified Muslim waqfs in U. P. In pursuance of the provisions of the Act, respondent 1 was constituted and, under section 5(1), it issued the notification on February 26, 1944, declaring the properties in suit to be a Sunni Waqf under the Act.

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After this notification was issued, respondent 1 called upon the committee of management of the waqf to submit its annual budget for approval and to get its accounts audited by its auditors. Respondent 1 also purported to levy the usual contributions against the waqf under section 54 of the Act. The members of the committee of management and the trustees with the exception of two persons held that the properties in suit did not constitute a waqf within the meaning of the Act and that respondent 1 had no authority or jurisdiction to supervise the management of the said properties. That is how the appellants came to institute the present suit on October 18, 1946, against respondent 1. That in brief is the background of the present dispute.

For the appellants *Mr. Dar* has raised three points before us. He contends that the High Court was in error in coming to the conclusion that the properties in suit constituted a waqf over which respondent 1 can exercise its authority or jurisdiction and he argues that it was erroneous to have held that the appellants' suit was barred by section 5(2) and was incompetent under section 53 of the Act. *Mr. Dar* has fairly conceded that if the finding of the High Court on the question of limitation or on the question of the bar pleaded under section 53 was upheld, it would be unnecessary to consider the merits of his argument about the character of the properties in suit. Since we have reached the conclusion that the High Court was right in holding that the suit was barred under section 5(2) and was also incompetent under section 53 of the Act, we do not propose to decide the question as to whether the properties in dispute are waqf within the meaning of the Act. The plea of limitation under section 5(2) as well as the plea of the bar under section 53 are in substance preliminary objections to the maintainability or competence of the suit and we propose to deal with these objections on the basis



that the properties in dispute are outside the purview of the Act as alleged by the appellants.

Before dealing with the question of limitation, it would be useful to refer to the relevant part of the scheme of the Act. Section 4 of the Act provides for the survey of waqfs to be made by the Commissioner of Waqfs appointed under sub-section (1) of section 4. Sub-section (3) requires the Commissioner to ascertain and determine *inter alia* the number of Shia and Sunni Waqfs in the district, their nature, the gross income of the properties comprised in them as well as the expenses incurred in the realisation of the income and the pay of the mutawalli. The Commissioner has also to ascertain and determine whether the waqf in question is one of those exempted from the provisions of the Act under section 2. The result of this enquiry has to be indicated by the Commissioner in his report to the State Government under sub-section (5). Section 6 deals with the establishment of two separate Boards to be called the Shia Central Board and the Sunni Central Board of Waqfs. Section 18 defines the functions of the Central Boards and confers on them general powers of superintendence over the management of the waqfs under their jurisdiction. After the Boards are constituted a copy of the Commissioner's report received by the State Government is forwarded to them and, under section 5, sub-section (1), each Central Board is required as soon as possible to notify in the official *Gazette* the waqfs relating to the particular sect to which, according to the said report, the provisions of the Act apply. It is after the prescribed notification is issued by the Board that it can proceed to exercise its powers under section 18 in respect of the waqfs thus notified. It is the notification issued by respondent under section 5(1) and the subsequent steps taken by it in exercise of its authority that have led to the present suit.

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*Mr. Dar* contends that the provisions of section 5(2) do not apply to the present suit, and so the argument that the suit is barred by limitation under the said section cannot succeed. It is clear that the notification was issued on February 26, 1944, and the suit has been filed on October 18, 1946. Thus there can be no doubt that if the one year's limitation prescribed by section 5(2) applies to the present suit it would be barred by time unless the appellants are able to invoke the assistance of section 15 of the Limitation Act. But, according to *Mr. Dar*, the present suit is outside section 5(2) altogether and so there is no question of invoking the shorter period of limitation prescribed by it.

Let us then proceed to consider whether the present suit falls within the mischief of section 5(2) or not. Section 5(2) provides that:

"The mutawalli of a waqf or any person interested in a waqf or a Central Board may bring a suit in a civil court of competent jurisdiction for a declaration that any transaction held by the Commissioner of Waqfs to be a waqf is not a waqf, or any transaction held or assumed by him not to be a waqf, or that a waqf held by him to pertain to a particular sect does not belong to that sect, or that any waqf reported by such Commissioner as being subject to the provisions of this Act is exempted under section 2, or that any waqf held by him to be so exempted is subject to this Act."

The proviso to this section prescribes the period of one year's limitation to a suit by a mutawalli or a person interested in the waqf. Sub-section (4) of section 5 lays down that the Commissioner of the Waqfs shall not be made a defendant to any suit under sub-section (2) and no suit shall be instituted against him for anything done by him in good faith under colour of this Act.

The appellants' argument is that before section 5(2) can be applied to their suit it must be shown that the

suit is filed either by a mutawalli of a waqf or any person interested in the waqf. The appellants are neither the mutawallis of the waqf, nor are they persons interested in the waqf. Their case is that the properties in suit do not constitute a waqf under the Act but are held by them as proprietors, and that the notification issued by respondent 1 and the authority purported to be exercised by it in respect of the said properties are wholly void. How can the appellants who claim a declaration and injunction against respondent 1 on these allegations be said to be persons interested in the waqf, asks Mr. Dar. The word 'waqf' as used in this sub-section must be given the meaning attached to it by the definition in section 3(1) of the Act and since the appellants totally deny the existence of such a waqf, they cannot be said to be interested in the 'waqf'. The argument thus presented appears *prima facie* to be attractive and plausible; but on a close examination of section 5(2), it would appear clear that the words "any person interested in a waqf" cannot be construed in their strict literal meaning. If the said words are given their strict literal meaning, suits for a declaration that any transaction held by the Commissioner to be a waqf is not a waqf can never be filed by a mutawalli of a waqf or a person interested in a waqf. The scheme of this sub-section is clear. When the Central Board assumes jurisdiction over any waqf under the Act it proceeds to do so on the decision of three points by the Commissioner of Waqfs. It assumes that the property is a waqf, that it is either a Sunni or a Shia waqf, and that it is not a waqf which falls within the exceptions mentioned in section 2. It is in respect of each one of these decisions that a suit is contemplated by section 5, sub-section (2). If the decision is that the property is not a waqf or that it is a waqf falling within the exceptions mentioned by section 2, the Central Board may have occasion to bring a suit. Similarly, if the decision is that the waqf is Shia and not Sunni, a

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Sunni Central Board may have occasion to bring a suit and *vice versa*. Likewise the decision that the property is a waqf may be challenged by a person who disputes the correctness of the said decision. The decision that a property does not fall within the exceptions mentioned by section 2 may also be challenged by a person who claims that the waqf attracts the provisions of section 2. If that be the nature of the scheme of suits contemplated by section 5(2), it would be difficult to imagine how the mutawalli of a waqf or any person interested in a waqf can ever sue for a declaration that the transaction held by the Commissioner of the Waqfs to be a waqf is not a waqf. That is why we think that the literal construction of the expression "any person interested in a waqf" would render a part of the sub-section wholly meaningless and ineffective. The legislature has definitely contemplated that the decision of the Commissioner of the Waqfs that a particular transaction is a waqf can be challenged by persons who do not accept the correctness of the said decision, and it is this class of persons who are obviously intended to be covered by the words "any person interested in a waqf". It is well settled that in construing the provisions of a statute courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective; an attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. In our opinion, on a reading of the provisions of the relevant sub-section as a whole, there can be no doubt that the expression "any person interested in a waqf" must mean "any person interested in what is held to be a waqf". It is only persons who are interested in a transaction which is held to be a waqf who would sue for a declaration that the decision of the Commissioner of the Waqfs in that behalf is wrong, and that the transaction in fact is not a waqf under the Act. We must accordingly hold that the

relevant clause on which *Mr. Dar* has placed his argument in repelling the application of section 5(2) to the present suit must not be strictly or literally construed, and that it should be taken to mean any person interested in a transaction which is held to be a waqf. On this construction the appellants are obviously interested in the suit properties which are notified to be waqf by the notification issued by respondent 1, and so the suit instituted by them would be governed by section 5, sub-section (2) and as such it would be barred by time unless it is saved under section 15 of the Limitation Act.

In this connection, it may be relevant to refer to the provisions of section 33 of the Indian Arbitration Act (X of 1940). This section provides that any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement shall, apply to the court and the court shall decide the question on affidavits. It would be noticed that the expression "any party to an arbitration agreement" used in the section poses a similar problem of construction. The party applying under section 33 may dispute the very existence of the agreement and yet the applicant is described by the section as a party to the agreement. If the expression "any party to an arbitration agreement" is literally construed, it would be difficult to conceive of a case where the existence of an agreement can be impeached by a proceeding under section 33. The material clause must, therefore, be read liberally and not literally or strictly. It must be taken to mean a person who is alleged to be a party to an arbitration agreement; in other words, the clause must be construed to cover cases of persons who are alleged to be a party to an arbitration agreement but who do not admit the said allegation and want to challenge the existence of the alleged agreement itself. This liberal construction has been

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put upon the clause in several judicial decisions: *Chaturbhuj Mohanlal v. Bhicam Chand* (1); *Kathu Kutty v. Varee Kutty* (2); *Lal Chand v. Messrs. Basanta Mal Devi Dayal* (3). We may also point out incidentally that in dealing with an application made under section 34 of the Arbitration Act, it is incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties; in other words, the allegation by one party against another that there is a valid agreement of reference between them does not preclude the latter party from disputing the existence of the said agreement in proceedings taken under section 34. These decisions illustrate the principle that where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the provision and to make the whole of it effective and operative.

Before we part with this part of the appellants' case, it is necessary to point out that the argument urged by *Mr. Dar* on the construction of section 5(2) is really inconsistent with the appellants' pleas in the trial court. The material allegations in the plaint clearly amount to an admission that the Dargah and its appurtenant properties constitute a waqf under the Act; but it is urged that they do not attract its provisions for the reason that the waqf in question falls within the class of exemptions enumerated in section 2(ii) (a) and (c) of the Act. "The Dargah waqf", says the plaint in para. 11, "is of such a nature as makes it an exception from the purview of the Act as provided by section 2 of the Act". Indeed, consistently with this part of the appellants' case, the plaint expressly admits that the

(1) (1948) 53 C.W.N. 410.

(2) A.I.R. 1950 Mad. 64.

(3) (1947) 49 P.L.R. 246.

cause of action for the suit accrued on February 26, 1944, and purports to bring the suit within time by relying on sections 14, 15, 18 and 29 of the Limitation Act. In their replication filed by the plaintiffs an attempt was made to explain away the admissions contained in the plaint by alleging that "if ever in any paper or document the word 'waqf' had been used as a routine of hurriedly, then it is vague and of no specific meaning and its meaning or connotation is only trust or amanat"; and yet, in the statement of the case by the appellants' counsel, we find an express admission that the subject matter of the suit is covered by the exemptions of section 2, clauses (ii) (a) and (ii) (c). Thus, on the pleadings there can be no doubt that the appellants' case was that the Dargah and its properties no doubt constituted a waqf under the Act, but they did not fall within the purview of the Act because they belong to the category of waqfs which are excepted by section 2(ii) (a) and (c). The argument based on the application of section 2 has not been raised before us and so on a consideration of the pleadings of the appellants it would be open to respondent 1 to contend that the appellants are admittedly interested in the waqf and their suit falls within the mischief of section 5, even if the words "any person interested in a waqf" are literally and strictly construed.

The next question which calls for our decision is whether the appellants' suit is saved by virtue of the provisions of section 15 of the Limitation Act. That is the only provision on which reliance was placed before us by *Mr. Dar* on behalf of the appellants. Section 15 provides for "the exclusion of time during which proceedings are suspended" and it lays down that "in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continu-

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ance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded". It is plain that, for excluding the time under this section, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the section requires an order or an injunction which stays the institution of the suit. And so in cases falling under section 15, the party instituting the suit would by such institution be in contempt of court. If an express order or injunction is produced by a party, that clearly meets the requirements of section 15. Whether the requirements of section 15 would be satisfied by the production of an order or injunction which by necessary implication stays the institution of the suit is open to argument. We are, however, prepared to assume in the present case that section 15 would apply even to cases where the institution of a suit is stayed by necessary implication of the order passed or injunction issued in the previous litigation. But, in our opinion, there would be no justification for extending the application of section 15 on the ground that the institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. It is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship; but there can be no doubt that, in construing provisions of limitation, equitable considerations are immaterial and irrelevant, and in applying them effect must be given to the strict grammatical meaning of the words used by them: *Nagendra Nath Dey v. Suresh Chandra Dey*, (1).

In considering the effect of the provisions contained in section 15, it would be useful to refer to the decision of the Privy Council in *Narayan Jivangouda v. Puttabai* (2). This case was an offshoot of the well-known case

(1) (1934) 34 Bom. L.R. 1065.

(2) (1944) 47 Bom. L.R. 1.



of *Bhimabai v. Gurunathgouda* (1). It is apparent that the dispute between Narayan and Gurunathgouda ran through a long and protracted course and it reached the Privy Council twice. The decision of the Privy Council in *Bhimabai's case* (1) upholding the validity of Narayan's adoption no doubt led to a radical change in the accepted and current view about the Hindu widow's power to adopt in the State of Bombay, but this decision was of poor consolation to Narayan because the judgment of the Privy Council in *Narayan Jivangouda's case* (2) shows that Narayan's subsequent suit to recover possession of the properties in his adoptive family was dismissed as barred by time. The dispute was between Narayan and his adoptive mother Bhimabai on the one hand and Gurunathgouda on the other. On 25th November, 1920, Gurunathgouda had sued Bhimabai and Narayan for a declaration that he was in possession of the lands and for a permanent injunction restraining the defendants from interfering with his possession. On the same day when the suit was filed, an interim injunction was issued against the defendants and it was confirmed when the suit was decreed in favour of Gurunathgouda. By this injunction the defendants were ordered not to take the crops from the fields in suit, not to interfere with the plaintiff's wahiwat to the said lands, not to take rent-notes from the tenants and not to obstruct the plaintiff from taking the crops raised by him or from taking monies from his tenants." Two important issues which arose for decision in the suit were whether Narayan had been duly adopted by Bhimabai in fact and whether Bhimabai was competent to make the adoption. These issues were answered against Narayan by the trial court. Bhimabai and Narayan appealed to the Bombay High Court, but their appeal failed and was dismissed: *Bhima-*

(1) (1932) 35 Bom. L.R. 200 P.C. (2) (1944) 47 Bom. L.R. I.  
 (3) (1928) 30 Bom. L.R. 859.

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*bai v. Gurunathgouda* (3). There was a further appeal by the said parties to the Privy Council. The Privy Council held that the adoption of Narayan was valid and so the appeal was allowed and Gurunathgouda's suit was dismissed with costs throughout. In the result the injunction granted by the courts below was dissolved on 4th November, 1932. On 25th November, 1932, Narayan and Bhimabai filed their suit to recover possession of the properties from Gurunathgouda. They sought to bring the suit within time *inter alia* on the ground that the time taken up in litigating the former suit or at least the period commencing from the grant of temporary injunction on 25th February, 1920, to 4th November, 1932, when the injunction was dissolved by the Privy Council should be excluded under section 15 of the Limitation Act. This plea was rejected by the trial court and on appeal the same view was taken by the Bombay High Court. RANGNEKAR, J., who delivered the principal judgment exhaustively considered the relevant judicial decisions bearing on the question about the construction of section 15 and held that the injunction issued against Narayan and Bhimabai in Gurunathgouda's suit did not help to attract section 15 to the suit filed by them in 1932: *Narayan v. Gurunathgouda* (1). The matter was then taken to the Privy Council by the plaintiffs; but the Privy Council confirmed the view taken by the High Court of Bombay and dismissed the appeal: *Narain v. Puttabai* (2).

In dealing with the appellants' argument that the injunction in the prior suit had been issued in wide terms and in substance it precluded the plaintiffs from filing their suit, their Lordships observed that there was nothing in the injunction or in the decree to support their case that they were prevented from instituting a suit for possession in 1920 or at any time before the expiry of the period of limitation. It appears from the

(1) (1938) 40 Bom. L.R., 1134.

(2) (1944) 47 Bom. L.R.I.

judgment that Sri Thomas Strangman strongly contended before the Privy Council that since the title of the contending parties was involved in the suit, it would have been quite futile to institute a suit for possession. This argument was repelled by the Privy Council with the observation that "we are unable to appreciate this point, for the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation". There can be little doubt that, if, on considerations of equity the application of section 15 could be extended, this was pre-eminently a case for such extended application of the said provision; and yet the Privy Council construed the material words used in section 15 in their strict grammatical meaning and held that no order or injunction as required by section 15 had been issued in the earlier litigation. We would like to add that, in dealing with this point, their Lordships did not think it necessary to consider whether the prohibition required by section 15 must be express or can even be implied.

There is another decision of the Privy Council to which reference may be made. In *Beti Maharani v. The Collector of Etawah* (1), their Lordships were dealing with a case where attachment before judgment under section 485 of the Code of Civil Procedure had been issued by the court at the instance of a third party prohibiting the creditor from recovering and the debtor from paying the debt in question. This order of attachment was held not to be an order staying the institution of a subsequent suit by the creditor under section 15 of Limitation Act of 1877. "There would be no violation of it" (said order), observed Lord HOBHOUSE, "until the restrained creditor came to receive his debt from the restrained debtor. And the institution of a suit might for more than one reason be a very proper proceeding on the part of the restrained creditor, as for example in this case, to avoid the bar by time, though

(1) (1894) I.L.R. 17 All. 108 (P.C.).

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it might also be prudent to let the court which had issued the order know what he was about". In *Sundaramma v. Abdul Khader* (1) the Madras High Court, while dealing with section 15 of the Limitation Act, has held that no equitable grounds for the suspension of the cause of action can be added to the provisions of the Indian Limitation Act.

It is true that in *Musammatt Basso Kaur v. Lala Dhun Singh* (2) their Lordships of the Privy Council have observed that it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not; but this observation must be read in the context of facts with which the Privy Council was dealing in this case. The respondent who was a debtor of the appellant had agreed to convey certain property to him setting off the debt against part of the price. No money was paid by the respondent and disputes arose as to the other terms of the agreement. The respondent sued to enforce the terms of the said agreement but did not succeed. Afterwards when he sued for the debt he was met with the plea of limitation. The Privy Council held that the decree dismissing the respondent's suit was the starting point of limitation. The said decree imposed on the respondent a fresh obligation to pay his debts under section 65 of the Indian Contract Act. It was also held alternatively that the said decree imported within the meaning of Art. 97 of Limitation Act of 1877 a failure of the consideration which entitled him to retain it. Thus it is clear that the Privy Council was dealing with the appellant's rights to sue which had accrued to him on the dismissal of his action to enforce the terms of the agreement. It is in reference to this right that the Privy Council made the observations to which we have already referred. These observations are clearly *obiter* and they cannot,

(1) (1932) I.L.R. 56 Mad. 490.

(2) (1888) 15 I.A. 211.

in our opinion, be of any assistance in interpreting the words in section 15.

It is in the light of this legal position that we must examine the appellants' case that the institution of the present suit had been stayed by an injunction or order issued against them in the earlier litigation of 1940.

We have already noticed that Civil Suit No. 1 of 1940 had been instituted against the appellants with the sanction of the Advocate General for their removal and for the settlement of a fresh scheme. The appellants were ordered to be removed by the learned trial judge on 16th October, 1941; but on appeal the decree of the trial court was set aside on 7th March, 1946. It is the period between 16th October, 1941, and 7th March, 1946, that is sought to be excluded by the appellants under section 15 of the Limitation Act. *Mr. Dar* contends that the order passed by the trial judge on 16th October, 1941, made it impossible for the appellants to file the present suit until the final decision of the appeal. By this order the appellants were told that they should not in any way interfere with the affairs of the Dargah Sharif as members of the committee and should comply with the decree of the court by which they were removed from the office. It is obvious that this order cannot be construed as an order or an injunction staying the institution of the present suit. In fact the present suit is the result of the notification issued by respondent 1 on 26th February, 1944, and the subsequent steps taken by it in the purported exercise of its authority under the Act. The cause of action for the suit has thus arisen subsequent to the making of the order on which *Mr. Dar* relies; and on the plain construction of the order it is impossible to hold that it is an order which can attract the application of section 15 of the Limitation Act. We have already held that the relevant words used in section 15 must be strictly construed without any consideration of equity,

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and so construed, we have no doubt that the order on which Mr. *Dar* has placed reliance before us is wholly outside section 15 of the Limitation Act. We would, however, like to add that this order did not even in substance create any difficulty against the institution of the present suit. The claim made by the appellants in the present suit that the properties in suit do not constitute a waqf and the declaration and injunction for which they have prayed do not infringe the earlier order even indirectly or remotely. We must, accordingly, hold that the High Court was right in taking the view that section 15 did not apply to the present suit and that it was, therefore, filed beyond the period of one year prescribed by section 5(2) of the Act.

That takes us to the consideration of the next preliminary objection against the competence of the suit under section 53 of the Act. Section 53 provides that "no suit shall be instituted against a Central Board in respect of any act purporting to be done by such Central Board under colour of this Act or for any relief in respect of any waqf until the expiration of two months next after notice in writing has been delivered to the Secretary, or left at the office of such Central Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left". This section is similar to section 80 of the Civil Procedure Code. It is conceded by Mr. *Dar* that if section 53 applies to the present suit, the decision of the High Court cannot be successfully challenged because the notice required by section 53 has not been given by the appellants before the institution of the present suit. His argument, however, is that the notification issued by respondent 1 on 26th February, 1944, did not refer to the Dargah and offerings made by the devotees before the Dargah and he contends that the present suit in respect

of these properties is outside the provisions of section 53 and cannot be held to be barred on the ground that the requisite notice had not been given by the appellants. We are not impressed by this argument. Column 1 of the notification in question sets out the name of the creator of the waqf as Shahan-e-Mughalia and the name of the waqf as Syed Salar Mahsood Ghazi. In column 2 the name of the mutawalli is mentioned, while column 3 describes the properties attached to the waqf. The tomb of Syed Salar Mahsood Ghazi which is the object of charity in the present case is expressly mentioned in column 1 and so it is futile to suggest that the tomb or Dargah had not been notified as a waqf by respondent 1 under section 5(1). In regard to the offerings we do not see how offerings could have been mentioned in the notification. They are made from time to time by the devotees who visit the Dargah and by their very nature they constitute the income of the Dargah. It is unreasonable to assume that offerings which would be made from year to year by the devotees should be specified in the notification issued under section 5(1). We must, therefore, reject the argument that any of the suit properties have not been duly notified by respondent 1 under section 5(1) of the Act. If that be so, it was incumbent upon the appellants to have given the requisite notice under section 53 before instituting the present suit. The requirement as to notice applies to suits against a Central Board in respect of their acts as well as to suits for any relief in respect of any waqf. It is not denied that the present suit would attract the provisions of section 53 if the argument that the Dargah and the offerings are not notified is rejected. The result is that the suit is not maintainable as a result of the appellants' failure to comply with the requirements of section 53. We would accordingly confirm the finding of the High Court that the appellants' suit is barred by time under

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section 5(2) and is also not maintainable in view of the fact that the appellants have not given the requisite notice under section 53 of the Act.

The result is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

## SUPREME COURT

### APPELLATE CIVIL

*Before the Honourable S. R. Das, Chief Justice, and Mr. Justice Bhagwati, Mr. Justice Sinha, Mr. Justice Rao and Mr. Justice Wanchoo.*

THE SALES TAX OFFICER, BANARAS AND OTHERS  
(APPELLANTS)

v.

KANHAIYA LAL MAKUND LAL SARAF  
(RESPONDENT)

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[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

**Constitution of India, 1950, Art. 226—Indian Contract Act, 1872, s. 72—Payment under a mistake of law—Whether recoverable—Indian Evidence Act, 1872, s. 115—Both the parties under a mistake of law—Whether estoppel arises.**

The respondent by a petition under Art. 226 of the Constitution of India asked for the quashing of assessment orders relating to forward transactions and claimed a refund of amounts paid by way of tax in respect of such transactions from the Government on the ground that levy of such tax had been declared *ultra vires*. The principal defence by the Government was that the amounts were paid under a mistake of law and were, therefore, irrecoverable. The High Court directed refund holding that s. 72 of the Indian Contract Act applied and the Government could not retain moneys unlawfully received by it. On an appeal by the Government to the Supreme Court,

*Held*, that s. 72 of the Indian Contract Act is wide enough to cover a mistake of fact as well as a mistake of law. There is no conflict between the provisions of section 72 of the Act on the one hand and ss. 21 and 22 on the other. The true position is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. Where



therefore, the tax liability was *ultra vires*, the amounts were paid by the respondent when they were not due by contract or otherwise. The respondent consequently, was entitled to recover the amounts under s. 72 of the Indian Contract Act.

*Held*, further, that no question of estoppel can arise, where both the parties, as in the present case, are labouring under a mistake of law, and one party is not more to blame than the other.

The appeal, accordingly, was dismissed.

Case-law discussed.

Civil Appeal No. 87 of 1957 from the judgment and decree of the Allahabad High Court, dated 1st December, 1955, in Special Appeal No. 18 of 1955, arising out of Civil Miscellaneous Writ No. 355 of 1952.

The facts appear in the judgment.

*H. N. Sanyal*, Additional Solicitor General of India, (*G. C. Mathur* and *C. P. Lal*, Advocates with him), for the appellants.

*P. R. Das*, Senior Advocate, (*B. P. Maheshwari*, Advocate, with him), for the respondent.

The following judgment of the Court was delivered by—

BHAGWATI, J.:—The facts leading up to this appeal lie within a narrow compass.

The respondent is a firm registered under the Indian Partnership Act dealing in Bullion Gold and Silver ornaments and forward contracts in Silver Bullion at Banaras in the State of Uttar Pradesh. For the assessment years 1948-49, 1949-50 and 1950-51 the Sales Tax Officer, Banaras, the appellant No. 1 herein, assessed the respondent to U. P. Sales Tax on its forward transactions in Silver Bullion. The respondent had deposited the sums of Rs.150-12-0, Rs.470-0-0 and Rs.741-0-0 for the said three years which sums were appropriated towards the payment of the sales tax liability of the firm under the respective assessment orders passed on 31st May, 1949, 30th October, 1950, and 22nd August, 1951.

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The levy of sales tax on forward transactions was held to be *ultra vires* by the High Court of Allahabad by its judgment delivered on 27th February, 1952, in *Messrs. Budh Prakash Jai Prakash v. Sales Tax Officer, Pilibhit* (1) and the respondent by its letter, dated 8th July, 1952, asked for a refund of the amounts of sales tax paid as aforesaid. The appellant No. 2, the Commissioner of Sales Tax, U. P., Lucknow, however, by his letter dated 19th July, 1952, refused to refund the same.

The respondent thereafter filed in the High Court of Allahabad the Civil Miscellaneous Writ Petition No. 355 of 1952 under Article 226 of the Constitution and asked for a writ of *certiorari* for quashing the aforesaid three assessment orders and a writ of *mandamus* requiring the appellants to refund the aforesaid amounts aggregating to Rs.1,365-12-0. The judgment of the Allahabad High Court was confirmed by this Court on 3rd May, 1954, in *Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash* (2) and the writ petition aforesaid was heard by CHATURVEDI, J. The learned judge by an order dated 30th November, 1954, quashed the said assessment orders in so far as they purported to assess the respondent in respect of forward contracts in Silver and also issued a writ of *mandamus* directing the appellants to refund the amounts paid by the respondent.

The appellants filed a Special Appeal No. 18 of 1955 in the High Court of Allahabad against that order of the learned Judge. A Division Bench of the said High Court heard the said appeal on 1st December, 1955. It was argued by the Advocate General on behalf of the appellants that the amounts in dispute were paid by the respondent under a mistake of law and were therefore, irrecoverable. The Advocate General also stated categorically that in that appeal he did not contend

(1) 1952 A.L.J. 332.

(2) (1955) 1 S.C.R. 243.

that the respondent ought to have proceeded for the recovery of the amount claimed otherwise than by way of a petition under Article 226 of the Constitution. The High Court came to the conclusion that section 72 of the Indian Contract Act applied to the present case and the State Government must refund the moneys unlawfully received by it from the respondent on account of Sales Tax. It accordingly dismissed the appeal with costs.

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The appellants then applied for a certificate under Article 133(1)(b) of the Constitution, which certificate was granted by the High Court on 30th July, 1956, on the Advocate General's giving to the Court an undertaking that the State will, in any event, pay the costs, charges and expenses incurred by or on behalf of the respondent as taxed by this Court. This appeal has accordingly come up for hearing and final disposal before us at the instance of the Sales Tax Officer, Banaras, appellant No. 1, the Commissioner, Sales Tax, U. P., Lucknow, appellant No. 2 and the State of U. P., appellant No. 3.

The question that arises for our determination in this appeal is whether section 72 of the Indian Contract Act applies to the facts of the present case.

The learned Additional Solicitor General appearing for the appellants tried to urge before us that the procedure laid down in the U. P. Sales Tax Act by way of appeal and/or revision against the assessment orders in question ought to have been followed by the respondent and that not having been done, the respondent was debarred from proceeding in the civil courts for obtaining a refund of the monies paid as aforesaid. He also tried to urge that in any event a writ petition could not lie for recovering the monies thus paid by the

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respondent. Both those contentions were, however, not available to him by reason of the categorical statement made by the Advocate General before the High Court. The whole matter had proceeded on the basis that the respondent was entitled to recover the amount claimed in the writ petition which was filed. No such point had been taken either in the grounds of appeal or in the statement of case filed before us in this Court and we did not feel justified in allowing the learned Additional Solicitor General to take this point at this stage.

Section 72 of the Indian Contract Act is in the following terms:

"A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it."

As will be observed, the section in terms does not make any distinction between a mistake of law or a mistake of fact. The term "mistake" has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. It was, however, attempted to be argued on the analogy of the position in law obtaining in England, America and Australia that money paid under a mistake of law could not be recovered and that that was also the intendment of section 72 of the Indian Contract Act.

The position in English law is thus summarised in Kerr on "Fraud and Mistake", 7th Edition, at page 140:

"As a general rule it is well established in equity as well as at law, that money paid under a mistake of law, with full knowledge of the facts, is not recoverable, and that even a promise to pay, upon

a supposed liability, and in ignorance of law, will bind the party."

The ratio of the rule was thus stated by JAMES, L. J., in *Rogers v. Ingham* (1):

"If that proposition were true in respect of this case it must be true in respect to every case in the High Court of Justice where money has been paid under a mistake as to legal rights, it would open a fearful amount of litigation and evil in the cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, even one of them having knowledge of all the facts, and having given a release. The thing has never been done, and it is not a thing which, in my opinion, is to be encouraged. Where people have a knowledge of all the facts and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be reopened." (See also *National Pari Mutual Association Ltd. v. The King* (2) and Pollock on Contract, 13th Edition, at pp. 367 & 374).

The American doctrine is also to the same effect as appears from the following passage in Willoughby on Constitution of the United States, Vol. 1, p. 12:

"The general doctrine that no legal rights or obligation can accrue under an unconstitutional law is applied in civil as well as criminal cases. However, in the case of taxes levied and collected under statutes later held to be unconstitutional, the tax payer cannot recover unless he protested the payment at the time made. This, however, is a

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(1) L.R. [1876] 3 Ch. 351, 356.

(2) 47 T.L.R. 110.

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special doctrine applicable only in the case of taxes paid to the State. Thus, in transactions between private individuals, moneys paid under or in pursuance of a statute later held to be unconstitutional, may be recovered, or release from other undertakings entered into obtained."

The High Court of Australia also expressed a similar opinion in *Werrin v. The commonwealth* (1), where LATHAM, C. J., and MAC TIERNAN, J., held that money paid voluntarily under a mistake of law was irrecoverable. LATHAM, C. J., in the course of his judgment at p. 157 relied upon the general rule, as stated in Leake on Contracts, 6th Ed. (1911), p. 63 "that money paid voluntarily, that is to say, without compulsion or extortion or undue influence and with a knowledge of all the facts, cannot be recovered although paid without any consideration."

It is no doubt true that in England, America and Australia the position in law is that monies paid voluntarily, that is to say, without compulsion or extortion or undue influence and with a knowledge of all facts, cannot be recovered although paid without any consideration. Is the position the same in India?

It is necessary to observe at the outset that what we have got to consider are the plain terms of section 72 of the Indian Contract Act as enacted by the Legislature. If the terms are plain and unambiguous we cannot have resort to the position in law as it obtained in England or in other countries when the statute was enacted by the Legislature. Such recourse would be permissible only if there was any latent or patent ambiguity and the courts were required to find out what was the true intendment of the Legislature. Where, however, the terms of the statute do not admit of any such ambiguity, it is the clear duty of the courts to construe

(1) 59 C.L.R. 150.

the plain terms of the statute and give them their legal effect..

As was observed by Lord Herschell in the *Bank of England v. Vagliano Brothers* (1),

"I think the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

"If a Statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decision . . . . .

This passage was quoted with approval by their Lordships of the Privy Council in *Norendranath Sircar v. Kamal-Basini Dasi* (2) while laying down the proper mode of dealing with an Act enacted to codify a particular branch of the law.

The Privy Council adopted a similar reasoning in *Mohori Bibee v. Dhurmodas Ghose* (3) where they had to interpret section 11 of the Indian Contract Act. They had before them the general current of decisions

(1) L.R. [1891] A.C. 107, 144. (2) (1896) I.L.R. 23 Cal. 563, 571.  
(3) (1902) L.R. 30 I.A. 114.

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in India that ever since the passing of the Indian Contract Act the contracts of infants were voidable only. There were, however, vigorous protests by various judges from time to time; and there were also decisions to the contrary effect. Under these circumstances, their Lordships considered themselves at liberty to act on their own view of the law as declared by the Contract Act, and they had thought it right to have the case re-argued before them upon this point. They did not consider it necessary to examine in detail the numerous decisions above referred to, as in their opinion the "whole question turns upon what is the true construction of the Contract Act itself". They then referred to the various relevant sections of the Indian Contract Act and came to the conclusion that the question whether a contract is void or voidable pre-supposes the existence of a contract within the meaning of the Act and cannot arise in the case of an infant who is not, "competent to contract".

In *Satyabrata Ghose v. Mugneeram Bangur & Co.* (1) section 56 of the Indian Contract Act came up for consideration by this Court. Mr. Justice B. K. MUKHERJEA, (as he then was), while delivering the judgment of the Court quoted with approval the following observations of FAZL ALI, J., in *Ganga Saran v. Ram Charan* (2):

"It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act, 1872."

and proceeded to observe:

"It would be incorrect to say that section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principle of

(1) 1954 S.C.R. 310.

(2) 1952 S.C.R. 36, 52.



English law on the subject of frustration. It must be held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *de hors* these statutory provisions. The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts."

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It is, therefore, clear that in order to ascertain the true meaning and intent of the provisions, we have got to turn to the very terms of the statute itself, divorced from all considerations as to what was the state of the previous law or the law in England or elsewhere at the time when the statute was enacted. To do otherwise would be to make the law, not to interpret it. [See *Gwynne v. Burnell* (1) and *Kumar Kamalranjan Roy v. Secretary of State* (2)].

The courts in India do not appear to have consistently adopted this course and there were several decisions reached to the effect that section 72 did not apply to money paid under a mistake of law, e.g., *Wolf and Sons v. Dadyaba Khimji and Co.* (3) and *Appavoo Chettiar v. S. I. Rly. Co.* (4). In reading those decisions the courts were particularly influenced by the English decisions and also provisions of section 21 of the Indian Contract Act which provides that a contract is not voidable because it was caused by a mistake as to any law in force in British India. On the other hand, the Calcutta High Court had decided in *Jagdish Prasad Pannalal v. Produce Exchange Corporation Ltd.* (5) that the word "mistake" in section 72 of the Indian

(1) 7 Clark and Finnelley 696.

(2) (1938) I.R. 66 I.A. 1, 10.

(3) (1919) I.L.R. 44 Bom. 631, 649. (4) A.I.R. 1929 Mad. 177.

(5) A.I.R. 1946 Cal. 245.

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Contract Act included not only a mistake of fact but also a mistake of law and it was further pointed out that this section did not conflict with section 21 because that section dealt not with a payment made under a mistake of law but a contract caused by a mistake of law, whereas section 72 dealt with a payment which was either not under a contract at all or even if under a contract, it was not a cause of the contract.

The Privy Council resolved this conflict in *Shiba Prasad Singh v. Maharaja Srish Chandra Nandi* (1). Their Lordships of the Privy Council observed that the authorities which dealt with the meaning of "mistake" in the section were surprisingly few and it could not be said that there was any settled trend of authority. Their Lordships were, therefore, bound to consider this matter as an open question, and stated at p. 253:

"Those learned judges who have held that mistake in this context must be given a limited meaning appear to have been largely influenced by the view expressed in Pollock and Mulla's commentary on section 72 of the Indian Contract Act, where it is stated, (Indian Contract & Specific Relief Acts, 6th Ed. p. 402): "Mistake of law is not expressly excluded by the words of this section; but section 21 shows that it is not included". For example, *Wolf and Sons v. Dadyaba Khimji and Co.*, (2) MACLEOD, J., said, referring to section of "on the face of it mistake includes mistake of law. But it is said that under section 21 a contract is not voidable on the ground that the parties contracted under a mistaken belief of the law existing in British India, and the effect of that section would be neutralized if a party to such a contract could recover what he had paid by means of section 72 though under section 21 the

(1) (1949) L.R. 76 I.A. 244.

(2) (1919) I.L.R. 44 Bom. 631.

contract remained legally enforceable. This seems to be the argument of Messrs. Pollock and Mulla and as far as I can see it is sound." In *Appavoo Chettiar v. South Indian Rly.* (1) RAMESAM and JACKSON, JJ., say: "Though the word 'mistake' in section 72 is not limited it must refer to the kind of mistake that can afford a ground for relief as laid down in sections 20 and 21 of the Act . . . Indian law seems to be clear, namely, that a mistake, in the sense that it is a pure mistake as to the law in India resulting in the payment by one person to another and making it equitable that the payee should return the money is no ground for relief." Their Lordships have found no case in which an opinion that "mistake" in section 72 must be given a limited meaning has been based on any other ground. In their Lordships' opinion this reasoning is fallacious. If a mistake of law has led to the formation of a contract, section 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that that money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment "by mistake" in section 72 must refer to a payment which was not legally due and which could not have been enforced; the "mistake" is thinking that the money paid was due when, in fact, it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but, on the other hand, that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid.

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(1) A.I.R. 1949 Mad. 648.

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Moreover, if the argument based on inconsistency with section 21 were valid, a similar argument based on inconsistency with section 22 would be valid and would lead to the conclusion that section 72 does not even apply to mistake of fact. The argument submitted to their Lordships was that section 72 only applies if there is no subsisting contract between the person making the payment and the payee, and that the Indian Contract Act does not deal with the case where there is subsisting contract but the payment was not due under it. But there appears to their Lordships to be no good reason for so limiting the scope of the Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due. Their Lordships do not find it necessary to examine in detail the Indian authorities for the wider interpretation of "mistake" in section 72. They would only refer to the latest of these authorities, *Pannalal v. Produce Exchange Corp. Ltd.* (1) in which a carefully reasoned judgment was given by SEN, J. Their Lordships agree with this judgment. It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable, no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise."

We are of opinion that this interpretation put by their Lordships of the Privy Council on section 72 is correct. There is no warrant for ascribing any limited meaning to the word 'mistake' as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. There is no conflict between

(1) A.I.R. 1946 Cal. 245.

the provisions of section 72 on the one hand and ss. 21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same.

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The learned Additional Solicitor General, however, sought to bring his case within the observations of their Lordships of the Privy Council that their judgment did not imply that every sum paid under mistake is recoverable no matter what the circumstances might be and that there might be in a particular case circumstances which disentitle a plaintiff by estoppel or otherwise. It was thus urged that having regard to the circumstances of the present case, (i) in so far as the payments were in discharge of the liability under the U. P. Sales Tax Act and were voluntary payments without protest and also (ii) inasmuch as the monies which had been received by the State of U. P. had not been retained but had been spent away by it, the respondent was disentitled to recover the said amounts. Here also, we may observe that these contentions were not specifically urged in the High Court or in the statement of case filed by the appellants in this Court; but we heard arguments on the same, as they were necessarily involved in the question whether section 72 of the Indian Contract Act applied to the facts of the present case.

Re: (i) :—The respondent was assessed for the said amounts under the U. P. Sales Tax Act and paid the same; but these payments were in respect of forward transactions in silver. If the State of U. P. was not entitled to receive the sales tax on these transactions,

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the provision in that behalf being *ultra vires*, that could not avail the State and the amounts were paid by the respondent, even though they were not due by contract or otherwise. The respondent committed the mistake in thinking that the monies paid were due when in fact they were not due and that mistake on being established entitled it to recover the same back from the State under section 72 of the Indian Contract Act. It was, however, contended that the payments having been made in discharge of the liability under the U. P. Sales Tax Act, they were payments of tax and even though the terms of section 72 of the Indian Contract Act applied to the facts of the present case, no monies paid by way of tax could be recovered. We do not see any warrant for this proposition within the terms of section 72 itself. Reliance was, however, placed on two decisions of Madras High Court reported in *Municipal Council, Tuticorin v. Balli Bros.* (1) and *Municipal Council, Rajahmundry v. Subba Rao* (2). It may be noted, however, that both these decisions proceeded on the basis that the payments of the taxes were made under mistake of law which as understood then by the Madras High Court was not within the purview of section 72 of the Indian Contract Act. The High Court then proceeded to consider whether they fell within the second part of section 72, viz., whether the monies had been paid under coercion. The court held on the facts of those cases that the payments had been voluntarily made and the parties paying the same were, therefore, not entitled to recover the same. The voluntary payment was there considered in contradistinction to payment under coercion and the real ratio of the decisions was that there was no coercion or duress exercised by the authorities for exacting the said payments and, therefore, the payments having been voluntarily made, though under mistake of law,

(1) A.I.R. 1934 Mad. 420.

(2) A.I.R. 1937 Mad. 559.

were not recoverable. The ratio of these decisions, therefore, does not help the appellants before us. The Privy Council decision in *Sri Sri Shiba Prasad v. Srish Chandra Nandi* (1) has set the whole controversy at rest and if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of section 72 of the Indian Contract Act, even though such a distinction has been made in America, vide the passage from Willoughby on the Constitution of the United States, Vol. 1, p. 12 *op cit.* To hold that tax paid by mistake of law cannot be recovered under section 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid".

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If this is the true position the fact that both the parties, viz., the respondent and the appellants were labouring under a mistake of law and the respondent made the payments voluntarily would not disentitle it from receiving the said amounts. The amounts paid by the respondent under the U. P. Sales Tax Act in respect of the forward transactions in Silver, had already been deposited by the respondent in advance in accordance with the U. P. Sales Tax Rules and were appropriated by the State of U. P. towards the discharge of the liability for the sales tax on the respective assessment orders having been passed. Both the parties were then labouring under a mistake of law, the legal position as established later on by the decision of the Allahabad High Court in *Messrs. Budh Prakash Jai Prakash v. Sales Tax Officer, Pilibhit* (1) subsequently confirmed

(1) (1949) L.R. 76 I.A. 244.

(2) 1952 A.L.J. 332.

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by this Court in *Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash* (1) not having been known to the parties at the relevant dates. This mistake of law became apparent only on 3rd May, 1954, when this Court confirmed the said decision of the Allahabad High Court and on that position being established the respondent became entitled to recover back the said amounts which had been paid by mistake of law. The state of mind of the respondent would be the only thing relevant to consider in this context and once the respondent established that the payments were made by it under a mistake of law, (and it may be noted here that the whole matter proceeded before the High Court on the basis that the respondent had committed a mistake of law in making the said payments), it was entitled to recover back the said amounts and the State of U. P. was bound to repay or return the same to the respondent irrespective of any other consideration. There was nothing in the circumstances of the case to raise any estoppel against the respondent, nor would the fact that the payments were made in discharge of a tax liability come within the dictum of the Privy Council above referred to. Voluntary payment of such tax liability was not by itself enough to preclude the respondent from recovering the said amounts, once it was established that the payments were made under a mistake of law. On a true interpretation of section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject, however, to questions of estoppel, waiver, limitation or the like.

(1) (1955) 1 S.C.R. 243.



If once that circumstance is established the party is entitled to the relief claimed. If, on the other hand, neither mistake of law nor of fact is established, the party may rely upon the fact of the monies having been paid under coercion in order to entitle him to the relief claimed and it is in that position that it becomes relevant to consider whether the payment has been a voluntary payment or a payment under coercion. The latter position has been elaborated in English law in the manner following in *Twyford v. Manchester Corporation* (1) where ROMER, J., observed:

"Even so, however, I respectfully agree with the rest of WALTON, J.'s judgment, particularly with his statement that a general rule applies, namely, the rule that, if money is paid voluntarily, without compulsion, extortion, or undue influence, without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which might have been successfully resisted."

The principle of estoppel which has been adverted to by the Privy Council in *Sri Sri Shiba Prasad v. Srish Chanda Nandi* (2) as disentitling the plaintiff to recover the monies paid under mistake can best be illustrated by the decision by the Appeal Court in England reported in *Holt v. Markham* (3) where it was held that as the defendant had been led by the plaintiffs' conduct to believe that he might treat the money as his own, and in that belief had altered his position by spending it, the plaintiffs were estopped from alleging that it was paid under a mistake; and this brings us to a consideration of point No. 2 above stated.

Re: (ii): Whether the principle of estoppel applies or there are circumstances attendant upon the transaction which disentitle the respondent to recover back

(1) L.R. [1946] 1 Ch. 236, 241. (2) (1949) L.R. 76 I.A. 244.

(3) L.R. [1923] 1 K.B. 504.

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the monies, depends upon the facts and circumstances of each case. No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other. Estoppel arises only when the plaintiff by his acts or conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment; it is only then that the plaintiff is estopped from setting up a different state of facts. Even if this position can be availed of where the representation is in regard to a position in law, no such occasion arises when the mistake of law is common to both the parties. The other circumstances would be such as would entitle a court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the court to award the relief to the plaintiff. These are, however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him.

Such equitable considerations were imported by the Nagpur High Court in *Nagorao v. G. G.-in-Council* (1) where KAUSHALENDRA RAO, J., observed:

"The circumstances in a particular case, disentitle the plaintiff to recover what was paid under mistake."

"If the reason for the rule that a person paying money under mistake is entitled to recover it is that it is against conscience for the receiver to retain it, then when the receiver has no longer the money with him or cannot be considered as still having it as in a case when he has spent it on his own purposes—which is not the case here—different considerations must necessarily arise."

(1) A.I.R. 1951 Nag. 372, 374.

We do not agree with these observations of the Nagpur High Court. No such equitable considerations can be imported when the terms of section 72 of the Indian Contract Act are clear and unambiguous. We may, in this context, refer to the observations of their Lordships of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (1) at p. 125. In dealing with the argument which was urged there in regard to the minor's contracts which were declared void, viz., that one who seeks equity must do equity and that the minor against whom the contract was declared void must refund the advantage which he had got out of the same, their Lordships observed that this argument did not require further notice except by referring to a recent decision of the Court of Appeal in *Thurstan v. Nottingham Permanent Benefit Building Society* (1) since affirmed by the House of Lords and they quoted with approval the following passage from the judgment of ROMEG, L. J., at p. 13 of the earlier report:

"The short answer is that a Court of Equity can not say that it is equitable to compel a person to pay moneys in respect of a transaction which as against that person the Legislature has declared to be void."

That ratio was applied by their Lordships to the facts of the case before them and the contention was negatived. Merely because the State of U. P. had not retained the monies paid by the respondent but had spent them away in the ordinary course of the business of the State would not make any difference to the position and under the plain terms of section 72 of the Indian Contract Act the respondent would be entitled to recover back the monies paid by it to the State of U. P. under mistake of law.

The result, therefore, is that none of the contentions urged before us on behalf of the appellants in regard to the non-applicability of section 72 of the Indian

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(1) (1902) L.R. 30 I.A. 114.

(2) L.R. [1902] 1 Ch. 1.

Contract Act to the facts of the present case avail them and the appeal is accordingly dismissed with costs.

*Appeal dismissed.*

### APPELLATE CIVIL

*Before Mr. Justice Asthana and Mr. Justice Srivastava*

INDER GOPAL AND OTHERS

(APPELLANTS)

*v.*

MESSRS. BHIMRAJ HAR LAL AND OTHERS

(RESPONDENTS)

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**Hindu Law**—Joint family—Debt—Decree against father alone  
—Claim against son withdrawn—Execution—Son's liability  
—Debt not tainted—Constructive *res judicata*—Civil Procedure Code, 1908, O. XXIII, r. 1(3), applicability of.

A son's share in a Mitakshara joint family property is liable to be attached and sold in execution of a decree against the father although the claim against the son made a party to the suit was withdrawn if it was not shown that the debt was not a real debt and that it was of a gambling nature and tainted with immorality. No question of constructive *res judicata*, or O. XXIII, r. 1(3), Civil Procedure Code, arises in such a case.

Case-law discussed.

First Appeal Order No. 62 of 1953, from a decree of Om Prakash Trivedi, Civil Judge, Agra in Misc. Case no. 116 of 1952.

The facts appear in the judgment.

*G. P. Bhargava* and *N. D. Ojha*, for the appellants.

*D. Sanyal*, for the respondents.

ASTHANA, J.:—This is an appeal against the judgment and decree of the learned Civil Judge, Agra, disallowing the objection of the appellants under Order XXI, Rule 58, C. P. C., and section 47, C. P. C., that their share in the joint family ancestral property was not liable to attachment and sale in execution of a simple money decree which had been obtained by the respondent against their fathers Madan Gopal Chandra-bhan and Jagannath Prasad Chandrabhan.

It appears that the decree-holder Messrs. Bhimraj Harlalka filed a suit no. 3263 of 1947 in the High

Court of Judicature at Bombay for the recovery of a certain sum of money on the basis of accounts against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan, and Indar Gopal, Vijay Gopal and Raj Gopal sons of Madan Gopal Chandrabhan, and Amar Nath, son of Jagannath Prasad Chandrabhan. Learned counsel for the plaintiff stated during the pendency of the case after the evidence of the plaintiff's witnesses had been recorded, that he restricted his claim only against the defendants 1 and 5, namely, Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan and that he did not wish to ask for a decree against the remaining defendants. On the basis of this statement the High Court passed a decree against the defendants 1 and 5 only and dismissed the suit against the remaining defendants. Thereafter, an application for the execution of the decree was made in the Court of the Civil Judge, Agra, for the realisation of the decretal amount by attachment and sale not only of the interest of the judgment-debtors Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan but also of the interest of the present appellants and Raj Gopal, i.e., the entire joint family property belonging to them. Two objections were filed, one under Order XXI, Rule 58, C. P. C., by Raj Gopal and the other under section 47, C. P. C., by Vijay Gopal, Indar Gopal and Amar Nath. It was contended that the debt on the basis of which the simple money decree had been passed against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan never existed and, in the alternative, it was of a gambling nature and was tainted with immorality. They did not produce any evidence in support of their contention. It was also contended there that as the suit against the objectors had been dismissed their share in the joint family property could not be attached and sold in execution of the simple money decree against Madan Gopal Chandrabhan and Jagannath Prasad

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Chandrabhan. The learned Civil Judge did not accept the contention on behalf of the objectors that they were not liable for the payment of the decretal amount to the extent of their share in the joint family ancestral property. He, therefore, dismissed both the objections and it is against that order that the present appeal has been filed.

It may be mentioned here that the appeal was filed as First Appeal From Order only by three of the objectors, namely, Indar Gopal, Vijay Gopal and Amar Nath. At the time of the hearing of the appeal it was discovered that no First Appeal From Order lay and when this defect was pointed out to the learned counsel for the appellants they made a request that the appeal might be treated as Execution First Appeal from the decree of the lower court and we accordingly accepted this request and directed that the appeal may be treated as Execution First Appeal.

It was contended on behalf of the appellants that in view of the fact that they were parties to the original suit and that the suit had been dismissed against them their share in the joint family property could not be attached and sold in execution of a simple money decree which had been obtained against the judgment-debtors. It was further contended that in view of the provisions contained in Order XXIII, Rule 1(3), C. P. C., the decree-holder was precluded from instituting any fresh suit in respect of such subject matter or such part of the claim which had been abandoned by him in the previous suit or which had been withdrawn by him in the earlier suit, and in view of the fact that he could not file a fresh suit in respect of such claim he could also not proceed in execution with respect to that claim which had been withdrawn or against the defendants against whom such claim had been withdrawn.

We shall first proceed to consider as to how far the contention on behalf of the appellants that merely

because the suit had been dismissed against the appellants the decree-holder was precluded from executing the decree to the extent of their interest in the joint family property, is correct. Learned counsel for the appellants has relied on several decisions in support of his contention that once a suit has been dismissed against the sons it is not open to the decree-holder to proceed against them in execution of the decree which has been obtained against the father alone.

The first case relied on by him is of *Prahlad Das v. Dasarathi Sathpati* (1). It was held in this case that where the creditor impleaded the sons of a Hindu debtor as parties to the suit along with their father, the sons being parties to the suit the father could not be said to have represented them in the suit, and if in such a suit the court rightly or wrongly refused to pass a decree against the sons and passed a decree against the father only, the decree could not be said to have been obtained against the father both in his individual capacity and also as representing the sons, and such a decree against the father, not being a decree against the sons, it could not be executed against them, not because they were not under a pious obligation to pay the debt of their father, which was neither illegal nor immoral, but because the procedure of their enforcing their liability having been adopted the court refused to enforce it.

The next case is of *Kesho Ram v. Mst. Ram Dulari* (2). This was a suit on the basis of a mortgage against the father and his sons who formed a joint Hindu family. The suit was brought on the allegation that the mortgage in question had been executed for legal necessity. It was found that legal necessity had not been proved. The suit was consequently dismissed against the sons and a personal decree was passed against

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(1) A.I.R. 1940 Pat. 117.

(2) A.I.R. 1942 Oudh 9.

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the father who was the executant of the mortgage in question. The decree-holder made an application for the execution of the decree by the attachment and sale of the shares of the sons also against whom the suit had been dismissed in order to realise the decree. The sons filed an objection that their share in the joint family property, in view of the fact that the suit had been dismissed against them, could not be taken in execution of the decree. Their contention was upheld and it was decided that their share in the joint family property could not be attached in execution of the decree and that the decree-holder was barred from doing so on the principle of constructive *res judicata* and the provisions of O. II, r. 2, Civil Procedure Code.

The next case is of *Panchayati Akhara Nirvani v. Bindeshwari Prasad* (1). In this case the plaintiff had brought a suit on the basis of a mortgage against the mortgagor and his sons who constituted a joint Hindu family. The sons contested the suit on several grounds, one of which was that the mortgage in question had not been duly attested. This contention was accepted and the suit was dismissed against the sons. A personal decree was, however, passed against the father who was the executant of the mortgage. The plaintiff decree-holder proceeded to execute the decree against the interest of the sons also in the joint family property in spite of the fact that the suit had been dismissed against them. Execution against the shares of the sons was sought on the ground of their pious obligation to discharge their father's debts. It was held in this case that where the suit had been dismissed against the sons, the decree which had been obtained against the father could not be executed against the sons' shares in the joint family fund.

(1) A.I.R. 1952 All. 337.



Against these decisions learned counsel for the respondent has relied on several Madras decisions, and also on *Panchayati Akhara Nirvani v. Bindeshwari Prasad* (1), which is one of the cases which have been relied on by the learned counsel for the appellants. In *Periasami Swami v. Vaidhilingan Pillai* (2) the plaintiff had brought a suit against the father and his minor sons and had claimed a decree against the joint family property also so far as their interests in the property were concerned. He subsequently withdrew his claim against the sons. The question that arose for determination was whether the result of such withdrawal attracted the provisions of section 11, C. P. C., and whether the plaintiff was subsequently barred to proceed against the interest of the sons in execution on the ground of the pious obligation of the sons for the payment of the debt of their father which was not tainted with illegality or immorality. It was held that the result of the withdrawal of the suit against his sons did not operate as a bar for the decree-holder to execute the decree against the interest of the sons, though it entailed the statutory penalty enacted in O. XXIII, r. 1, C. P. C., which was that no fresh suit could be instituted against the defendants on the same cause of action.

In *Prahlad Das v. Dasarathi Sathpathi* (3) the creditor brought a suit against the father and his sons on the basis of a mortgage. The suit was dismissed against the sons and a simple money decree was passed against the father. The decree-holder sought to execute this decree against the interest of the sons also in the joint family property. It was held that the decree could not be executed against the sons not because they were not under a pious obligation to pay the debt of their father which was not illegal or immoral but because of the procedure of enforcement of their liability having been adopted and the court having refused to enforce it.

(1) A.I.R. 1952 All. 337.

(2) A.I.R. 1937 Mad. 718.

(3) A.I.R. 1940 Pat. 117.

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The next case is of *Desayi Venketraanga Reddi v. Praku Chinna Sithamma* (1). In this case PATANJALI SHASTRI, J., referring to the earlier Madras cases reported in *Periasami Swami v. Vaidhilingan Pillai* (2) and *Reddi Krishnan Naidu v. Chintala Somi Naidu* (3), pointed out the difference between cases where the suit is dismissed against the sons on merits and where it is dismissed because it is withdrawn by the plaintiff because he does not wish to proceed against the sons. He was of the opinion, in accordance with the above decisions, that where the suit was dismissed against the sons on merits and their share in the property was not held liable, their share could not be attached and sold in execution of a simple money decree which had been obtained against the father alone; but where the suit was dismissed against them because the plaintiff did not wish to proceed against them for some reason or other and, therefore, wanted to withdraw his claim against them, the above consequence would not follow and it would be open to the decree-holder to proceed in execution against their share in the joint family property, and by virtue of their pious obligation for the payment of the debt of their father in case such debt was not tainted with immorality or illegality, they would be liable for the decree.

After a consideration of the above cases it appears that a distinction has been drawn between a case where the claim is dismissed against the sons on the ground that the plaintiff does not wish to proceed against them for some reason or other and makes an application to withdraw the case against them and a case where the suit is dismissed against the sons on merits after adjudication. It has been the consistent view in all these cases that where the suit is dismissed against the sons after adjudication on merits the principle of section 11, C. P. C., would apply and execution of the decree against

(1) A.I.R. 1941 Mad. 440.

(2) A.I.R. 1937 Mad. 718.

(3) A.I.R. 1940 Mad. 544.

them for attachment and sale of their shares in the joint family property in order to satisfy the decree against their father would not be maintainable, but where no such adjudication has been made and the claim is dismissed against the sons merely on the ground that the plaintiff does not wish to proceed against them and withdraws his claim against them, no such consequence would follow and it would be open to the plaintiff decree-holder to proceed in execution against them on the ground of their pious obligation, and it would then be open to the sons to show that their share in the joint family property would not be liable because the debt was tainted with immorality or illegality.

I am not inclined to accept the contention on behalf of the appellants that merely because the suit had been dismissed against the sons it was necessarily a dismissal on merits after adjudication. I have examined the decree passed by the High Court of Bombay and from its perusal it is clear that the suit was dismissed against the sons merely on the statement of the plaintiff's counsel after the evidence of the witnesses that he did not wish to proceed against them and wanted to withdraw his claim against them, and there was really no adjudication on merits. In fact there was no occasion for entering into the question on merits when the plaintiff's counsel made the statement that he did not wish to proceed with the claim against the sons and that he might be permitted to withdraw it. The court had no other option but to allow the plaintiff's application for the withdrawal of his claim against the sons and the only consequence of this withdrawal and the dismissal of the suit on its basis will be that the plaintiff will be precluded from filing a fresh suit against the sons on the same cause of action. In view of the fact that the dismissal of the suit against the appellants was not on merits but was made merely on the oral statement of the learned counsel for the plaintiff that he

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wanted to withdraw the suit against them, I do not think that the bar of section 11, C. P. C., will be applicable to the execution proceedings or that the plaintiff will be deprived from executing the simple money decree obtained against their father on the basis of the debt. The case, however, would have been different if the suit were dismissed against the sons on adjudication that they were not liable for the payment of the debt either because it had not been proved or because it had not been taken for family necessity or family benefit. It is not necessary that the suit should have been dismissed on the same grounds which could have arisen for determination at the time of the execution of the decree. In other words, it is not necessary that the suit should have been dismissed against the sons on the ground that the debt was tainted with illegality or immorality. If the question of the liability of the sons for the payment of the debt arose in the suit and had to be decided by the court in that suit then the plaintiff should have taken all those grounds in the suit on which he considered the debt binding on the sons, and if he did not take some of the grounds on which the debt would be binding on the sons and the finding was given in favour of the sons on the grounds taken by the plaintiff in the suit, then according to Explanation 4 to section 11, C. P. C., any matter which might and ought to have been made a ground of defence or attack in the former suit should be deemed to have been a matter directly and substantially in issue in such suit and shall be deemed to have been decided. In view of this provision any finding in the former suit that the sons were not bound for the payment of the debt would operate as constructive *res judicata* in the execution proceedings and the decree could not be executed against them. I, however, do not think that this principle would be applicable where the suit is dismissed against the sons on the ground that the plain-

tiff had withdrawn it against them. It is immaterial at what stage the suit is withdrawn against them. It cannot be disputed that there is no occasion, in the circumstances for any finding by the court on the question of liability of the sons and the effect of the withdrawal of the suit against them would be that they were no parties to the suit. The principle of constructive *res judicata* would be applicable only in those cases where the suit is dismissed against the sons after adjudication with regard to their liability.

As regard the contention that the plaintiff was debarred from proceeding in execution against the appellants by virtue of the provisions contained in O. XXIII, r. 1(3), C. P. C., I am of the opinion that it has no force. So far as this Rule is concerned it only prevents the plaintiff from filing a fresh suit in respect of the same cause of action, which had been withdrawn by him at an earlier stage. It does not debar the plaintiff from putting his decree into execution against the sons if he is entitled to do so under some other provision of the law. It is well settled that according to the Hindu Law the sons will be bound for the payment of the debt of their father if the debt was not tainted with immorality and illegality, irrespective of the fact whether the father is alive or dead. In this view of the matter I am of the opinion that this contention too has no force.

It was next contended that the lower court had not decided whether the debt which was sought to be enforced against the appellants was tainted with immorality or illegality and, as such, it was not justified in dismissing the objections. It appears from an examination of the record of the execution case, which is before us, that a statement was made by the counsel for the appellants that he did not wish to produce any oral evidence in support of their objections. In view

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of this fact the lower court was quite justified in dismissing the objection of the appellants.

A request has been made before us on behalf of the appellants that the case may be sent back to the court below and an opportunity should be allowed to them to produce evidence in support of their contention raised in the objections filed in the lower court. I find that the appellants had an opportunity in the lower court to produce such evidence and they did not avail of such opportunity. On the contrary, they clearly made statements in the lower court that they did not wish to produce any oral evidence in support of their objections. In the circumstances there is no satisfactory reason to allow this request and give them further opportunity to produce evidence in support of the objections.

The result is that the appeal fails and is dismissed with costs.

SRIVASTAVA, J.:—I agree with the conclusion arrived at by my learned brother but would like to add a few words of my own. The interesting question which has been raised in this appeal relates to the manner in which the pious obligation of a son to pay his father's debts can be enforced and how far the obligation can be affected by the principle of *res judicata*. It is now beyond controversy that a Hindu son is under a pious obligation to pay his father's debts and in enforcement of that obligation the creditor of the father can proceed not only against the interest of the father in the joint family properties but also against the interest of the son. Whether the father is alive or dead is immaterial. The only way in which the son can escape this liability is by showing that either the debt did not exist at all or that it was *avyeoharik* i.e., it was tainted with illegality or immorality. It is but just that an opportunity be

given to the son at some stage to have his say in this respect.

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It appears to me that the cases in which this pious obligation can be sought to be enforced against the son can fall in four categories—

(1) Cases in which the creditor obtains a decree against the father alone but seeks to enforce it against the entire family property including the share of son.

(2) Cases in which the suit is filed against the son alone either in the lifetime of the father or after his death.

(3) Cases in which a suit for the recovery of the debt is filed against the father as well as the son and a decree is obtained against both.

(4) Cases in which a suit for the recovery of the debt is filed against the father and son both but is decreed against the father alone and is dismissed against the son.

So far as cases falling in the first category are concerned, it is not disputed that after obtaining a decree against the father the creditor can in execution proceed against the entire joint family property including the share of the son and it is in the execution department that the son will have a right to prove either that the debt was fictitious or, if it was real, that it was tainted with illegality or immorality. If he fails in establishing these facts, his share too will be held liable.

A suit against the son alone in the lifetime of the father will obviously not be maintainable because till the liability is established against the father, there can be no liability against the son. A suit against the son after the death of the father will certainly lie and in that suit it will be open to the son to prove that the debt was not due at all or that it could not be recovered from him on account of being tainted with illegality or immorality. If, however, in such a suit a decree is passed against the son, it can obviously be enforced against him in execution.

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In the third category of cases in which a suit is filed and a decree is obtained against the father as well as the son, the creditor will clearly be entitled to proceed against the son also in execution and if the son wants to escape liability, he can do so only by contesting the suit itself and in showing that the debt is not a real one or that the liability for it cannot be enforced against him on account of its nature.

It is the last category of cases which may lead to some difficulty. In this category fall cases in which the suit is against the father as well as the son but is decreed against the father but is dismissed against the son. In such cases it appears to me that the mere fact that the suit has been dismissed against the son does not necessarily debar the creditor from proceeding in execution against the entire joint family property, including the share of the son. In this class of cases the nature of the dismissal and the circumstances in which the order of dismissal was passed will have to be looked into. If it is found that the dismissal was based on some technical ground like the withdrawal of the claim against the son either in the trial court or the appellate court or on the ground that the son was an unnecessary party, then in spite of the dismissal it will be open to the creditor of the father to enforce the pious obligation of the son against him in the execution department. In such a case the position of the son will be the same as if he had not been impleaded in the suit at all and the decree had been obtained against the father alone. If, on the other hand, the suit is one in which the order of dismissal against the son is passed after the question of his pious liability has been considered either directly or constructively, there is obviously an end of the matter so far as the liability of the son's share for the debt is concerned. In such a case because it has been decided that the



interest of the son in the joint family property is not liable, the creditor cannot proceed on the basis of the decree he has obtained against the father alone against the interest of the son in the joint family property.

In the present case the suit had been filed both against the fathers and the sons. It was decreed against the fathers but dismissed against the sons. The real question which arises is whether the order of dismissal in favour of the sons was an order passed on merits or was an order based on the withdrawal of the claim against the sons by the plaintiff's counsel. My learned brother has stated the circumstances in which the suit was dismissed against the appellants and was decreed only against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan. From those circumstances it appears to be clear that the present case cannot be considered to be one in which the liability of the sons was considered either directly or constructively. It was not considered at all. The sons were contesting the suit and denying their liability but the occasion for consideration of their pleas did not arise as the plaintiff's counsel made a statement confining his claim to the fathers alone. The suit was, therefore, decreed against the fathers but dismissed against the sons. This being the case, the suit must be treated as one filed against the fathers alone. The creditor could, therefore, proceed against the sons in the execution department. If the sons wanted to escape liability, they could in that department raise the plea that the debt was not a real debt or that it was debt tainted with immorality or illegality and was on that account not realisable from their shares in the joint family property. In the present case an objection of this nature was actually filed on behalf of the appellants, but because no evidence was produced by them in support of the pleas there was no material before the court on the basis of which it could

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have accepted those contentions of the appellants. Apparently, the appellants confined their objections only to the ground that because the suit had been dismissed against them, it was not open to the decree-holder to proceed against them in execution. This plea was bound to fail in view of the fact that the dismissal against them was not on merits but was based on the withdrawal of the claim.

The cases on which the learned counsel for the appellants relied, viz., *Prahlad Das v. Dasarathi Sathpathi* (1), *Bijai Raj Singh v. Ram Padarath* (2) and *Kesho Ram v. Mst. Ram Dulari* (3) are all cases in which the liability of the sons had been decided in the suit itself either directly or constructively. The sons had been impleaded as parties in all these suits. In all these cases it was open to the creditors to claim a decree against the shares of the sons in the joint family property, even if the sons were not personally liable, on the basis of their pious obligation to pay their fathers' debts. No such claim was made and the suits were dismissed against the sons. None of these cases appears to be a case in which the suit was dismissed on the basis of withdrawal of the claim against the sons on any such technical ground. They are, therefore, not of much help to the appellants. The cases relied upon on behalf of the respondent, viz., *Periasami Swami v. Vaidhilingan Pillai* (4), *Reddi Krishnan Naidu v. Chintala Soni Naidu* (5) and *Shiam Lal v. Ganeshi Lal* (6) are, on the other hand, cases in which the claim against the sons was withdrawn at some stage and the suit was dismissed on that ground. These cases are, therefore, more to the point as compared to the cases relied upon on behalf of the appellants.

The case reported in *Panchayati Akhara Nirvani v. Bindeshwari Prasad* (7) has been relied upon by learned

(1) A.I.R. 1940 Pat. 117.

(3) A.I.R. 1942 Oudh 9.

(5) A.I.R. 1940 Mad. 544.

(2) A.I.R. 1936 Oudh 139.

(4) A.I.R. 1937 Mad. 718.

(6) (1906) I.L.R. 28 All. 288.

(7) A.I.R. 1952 All. 337.

counsel for both the parties. The judgment of the original suit in which the decree which was under execution in that case was passed has been reported in *Bindeshwari Prasad v. Panchayati Akhara* (1). A perusal of that judgment will show that in that case the suit must be held to have been dismissed against the sons constructively on merits. It was open in that case to the creditor to claim a decree against the shares of the sons in the joint family property but no such claim was made and the suit was allowed to be dismissed against the sons. It must in the circumstances be presumed that the question of the liability of the sons for the debt had been raised and decided against the creditor. It was, therefore, held when the sons objected to the decree being executed against them that it was not open to the decree-holder to proceed against the shares of the sons in execution. While disposing of the sons' objection the learned Judges referred to the cases in which the dismissal of the suit against the sons was based on withdrawal. They expressed their approval of those decisions but distinguished them from the case with which they were dealing. Strictly speaking this case in *Panchayati Akhara v. Bindeshwari Prasad* (2) favours the respondent more than the appellants.

In my opinion, therefore, in the present case it was open to the decree-holder to proceed against the interest of the sons also in execution of the decree which he had obtained against the father and the only way in which the sons could escape liability was by proving that the debt was not a real debt or that it was tainted with immorality. As they did not make any attempt to prove this and produced no evidence in support of this plea, their objection could not succeed.

The appellants had an opportunity of producing evidence and satisfying the court that the debt was not binding on them on account of its nature. They did

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not avail of that opportunity. I do not think they are entitled to any fresh opportunity of producing evidence on the same point.

I, therefore, agree that the appeal must fail.

By THE COURT:—The appeal is dismissed with costs. Let the record be sent to the court below at an early date for disposal.

*Appeal dismissed.*

### APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal*

HARDWARI LAL (APPELLANT)

*v.*

GENERAL MANAGER, NORTH-EASTERN RAIL-  
WAY AND ANOTHER (RESPONDENTS)

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October, 15

**Constitution of India, 1950, Art. 311(2)—Railway Establish-  
ment Code, r. 148—Valid—Railway permanent servant—No  
agreement—Dismissal on one month's notice valid—Civil  
Servant—Condition of service.**

Rule 148 of the Railway Establishment Code is not invalid.

A civil servant does not hold office during good behaviour but during the pleasure of the President or of the Governor according as to whether he holds a civil post under the Union or State and there is nothing to prevent the President or the Governor as the case may be regulating the conditions of service of persons appointed to such posts subject to the provisions of Article 311(2).

A permanent Railway servant, although he entered into no formal agreement with the railway administration, is nevertheless bound by Rule 148 and his service is liable to be terminated on one month's notice under Rule 148 of the Railway Establishment Code.

*Gopal Potnay v. Union of India* (1) and *Hartwell Prescott Singh v. Uttar Pradesh Government* (2) referred to.

Special Appeal no. 298 of 1957 from a decision of OAK, J., dated the 28th November, 1957, in Civil Miscellaneous Writ no. 620 of 1957.

The facts appear in the judgment.

S. N. Kacker, for the appellant.

Lakshman Swarup, for the respondents.

(1) A.I.R. 1954 S.C. 632.

(2) A.I.R. 1957 S.C. 886.

The judgment of the Court was delivered by—

**MOOTHAM, C.J.:**—This is an appeal from an order of Mr. Justice OAK dated the 28th November, 1957, dismissing a petition under Article 226 of the Constitution. The facts relevant for purposes of this appeal are these. On the 25th September, 1938, the appellant entered into the service of the Rohilkhand and Kumaun Railway as goods clerk and in February, 1940, he was confirmed in his appointment. In 1942 the Government of India decided to take over the management of the Rohilkhand-Kumaun Railway, (and also that of the B. N.-W. Railway), with effect from the 1st January, 1943, and in October, 1942, it made an offer of employment to the non-gazetted staff, (which included the appellant), of the two railways. The appellant accepted the offer, and on and from the 1st January, 1943, he accordingly became an employee of the Central Government.

In the beginning of 1952 the appellant was posted as goods clerk at Izatnagar, and on the 25th of January of that year he was served with a charge-sheet alleging misconduct, inefficiency and neglect of duty. On the 30th January, 1952, the appellant submitted his reply to the charge-sheet, and it appears that the railway administration was satisfied with that explanation, as no further action was taken against the appellant. In April, 1956, the appellant was transferred to Gorakhpur and on the 8th May, 1956, he received a communication from the General Manager, dated the 24th/26th April, 1956, terminating his services. This communication was in the following terms:

“Please take notice that the General Manager, N.-E. Railway, Gorakhpur, in exercise of the special powers vested in him has ordered termination of your service in terms of the condition of your service, with immediate effect, with one month's pay in lieu of notice.”

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Against this order the appellant appealed without success to the Railway Board. Thereafter the appellant sent a number of applications to the General Manager for the reconsideration of his case and on the 28th January, 1957, he received a second communication from the General Manager informing him that "it is regretted that your services are not required by this administration". The appellant then filed a petition in this Court in which the principal relief sought was the issue of a writ of *certiorari* quashing the 'orders' of the General Manager dated respectively of the 24th/26th April, 1956, and the 28th January, 1957. That petition was dismissed and the appellant now appeals. The appeal has been very well argued before us, but notwithstanding the numerous authorities which have been cited, we do not think that it raises questions of any great difficulty.

The basic argument of *Mr. S. N. Kacker* for the appellant is that the appellant was a permanent servant of the railway administration in the sense that he was, subject to his good behaviour, entitled to remain in service until the age of 55, and that in such circumstances the termination of his service before he had attained that age necessarily amounted to dismissal or removal and attracted the provisions of Article 311 of the Constitution. *Mr. Lakshman Swarup* for the respondent administration contends that although the appellant comes within the category of railway employees known as permanent non-gazetted staff, his employment with the railway administration is subject to the provisions of the Railway Establishment Code, and that his services have been lawfully terminated in accordance with the provisions of that Code. The first matter to be decided is, therefore, the terms of the appellant's employment. His learned counsel concedes that the appellant's right to continue in service until he attains the age of 55 is

a right which could have been circumscribed by agreement between the appellant and the railway administration, or by a rule which is binding on the appellant. He contends, however, that the appellant entered into no formal agreement with the railway administration and that he is not subject to the rules to be found in the Railway Establishment Code.

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Now the offer of employment which was made to the appellant by the Government of India in October, 1952 is in the following terms:

"Under instructions contained in their letter no. E41TR46(2), dated the 18th September, 1952, I, on behalf of the Government of India, Railway Department (Railway Board) offer you employment under the Government of India, with effect from the 1st January, 1943, on the terms and conditions specified on reverse. Will you please let me know in the subjoined form within 30 days from the date of this letter whether you accept the offer. If you accept this offer, you will subsequently be required to execute a formal Service Agreement.

2. In this connection please note the following:

(1) It must be understood that, as a State Railway servant, you will be required to retire at the age of 55 unless granted an extension of service.

3. ....

4. Persons appointed on or after the 1st January, 1943, will be governed by the State Railway rules in all matters, and they will be entitled to any new scales of pay which may be fixed by Government. If the revised scales of pay involve an improvement over existing ones, they will be extended to the staff now being taken over from the Company."

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Then follow the terms offered to the non-gazetted staff of the two railways, the first of which, relating to pay and allowances, reads thus:

“(1) Pay and Allowance. On the existing Company scales and under the existing rules and conditions of service of the Company subject to what is stated in para. 4 *ante*.....”

None of the terms relates to the termination of the employee's services.

It is common ground that the appellant never executed a service agreement. But there is no doubt that he did accept the offer of employment to which we have referred. Paragraph 4 of this offer states specifically that persons appointed on or after the 1st January, 1943, will be governed in all matters by the State Railway rules which, it is not in dispute, mean the rules to be found in the Indian Railway Establishment Code. Learned counsel for the appellant contends, however, that clause 4 of the offer refers only to persons who were not employees of either the Bengal and North-Western Railway or the Rohilkhand and Kumaun Railway and that this paragraph does not, therefore, apply to the appellant. We think there is no force in this argument. The offer of employment is addressed exclusively to the employees of the two railways, and we can entertain no doubt that paragraph 4 of the offer is a condition subject to which the offer is made. We are accordingly of opinion that in accepting the Government of India's offer of employment the appellant agreed to be bound by the provisions of the Railway Establishment Code. The terms specified on the reverse of the offer are obviously not exhaustive. They were, we consider, provisions intended to bridge over such differences as there were between the conditions of service of the two railway companies and the State Railway



rules to which the former employees of those companies would now become subject.

Now rule 148 of the Railway Establishment Code provides that the services of a permanent non-gazetted employee shall be liable to termination on one month's notice on either side or by the Railway Administration paying the employee one month's pay; and it is under this rule that the railway administration acted in determining the appellant's services. It was suggested in argument that this rule is invalid as it abridged the appellant's right to remain in the railway administration's service until he attained the age of superannuation. This argument in our opinion has no force. A civil servant does not hold office during good behaviour but during the pleasure of the President or of the Governor according as to whether he hold a civil post under the Union or under a State, and there is nothing to prevent the President or the Governor as the case may be regulating the conditions of service of persons appointed to such posts subject to the provisions of Article 311(2).

The form of service agreement which ought to have been executed by the appellant and the railway administration contains a provision for the termination of the employee's services in the same terms as are set out in Rule 148, and had such agreement been executed there can be no doubt that the determination of the appellant's services in accordance with its terms would have been valid: *Gopal Krishna Potnay v. Union of India* (1). The fact that no such agreement was executed is immaterial, for, as pointed out by the Supreme Court in *Hartwell Prescott Singh v. The Uttar Pradesh Government* (2), there is no clear distinction between the termination of the services of a person under the terms of a contract governing him and the termination of his ser-

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vices in accordance with the terms of his conditions of service. The appellant's services were so determined and in our opinion the learned Judge rightly dismissed the petition.

This appeal fails and is dismissed with costs.

*Appeal dismissed.*

### APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal.*

BOARD OF HIGH SCHOOL AND INTER-  
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(APPELLANTS).

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G. VISHWANATH NAYAR (RESPONDENT)

**United Provinces Intermediate Education Act, 1921, s. 15—  
Regulations, Ch. XII, 5, cls. 2 and 5—Infringement of—Can-  
didate wrongly presented—Board can withhold result.**

A candidate presented at the High School Examination by his institution in defiance of the provisions of cl. (ii) or cl. (v) of Regulation 5 of Chapter XII, framed under s. 15 of the Intermediate Education Act, 1921, and permitted thereupon to sit at the examination acquires no right in law to compel the Board to declare the result of his examination unless the Board has condoned the infraction of the Regulation.

*Jitendra Kumar Gupta v. Board of High School and Inter-  
mediate Education* (1) relied on.

Special Appeal no. 339 of 1958 from a decision of DHAVAN, J., dated the 20th August, 1958, in Civil Miscellaneous Writ no. 2279 of 1957.

The facts appear in the judgment.

The Standing Counsel (K. B. Asthana) for the appellant.

C. S. P. Singh, Counsel for Respondent.

The judgment of the Court was delivered by—

MOOTHAM, C. J.:—This is an appeal by the respondents from an order of Mr. Justice Dhavan dated the 20th August, 1958, allowing a petition under Article 226 of the Constitution.

(1) 1956 A.L.J. 625.

The petitioner was a student of Class X of the Agarsen Intermediate College, Allahabad. He appeared at the High School Examination in the year 1955 but was unsuccessful, and he sat again for the same Examination in 1956. The result of his examination was not, however, published with the result of the other candidates, and after a good deal of delay the petitioner was informed that his examination had been cancelled by the Chairman of the Board of High School and Intermediate Education, (which had conducted the Examination), on the ground that he had not attended the prescribed number of classes. The petitioner then filed a petition in this Court in which he contended that as he had been permitted by the Board of High School and Intermediate Education to sit for the Examination, it was not within the power of the Board or of the Chairman thereafter to cancel the Examination on the ground of shortage of attendance; and he prayed for the issue, first, of a writ quashing the order of the Chairman cancelling his examination and, secondly, for the issue of a writ commanding the Board to declare his result at the Examination in question. The learned Judge granted the reliefs sought and the respondents, namely, the Board of High School and Intermediate Education, the Director of Education, Uttar Pradesh, and the Secretary of the Board of High School and Intermediate Education, now appeal.

The Board of High School and Intermediate Education was established by the Intermediate Education Act, 1921, for the purpose of regulating and supervising the system of High School and Intermediate education in the State. Under section 7 of that Act the Board has power to conduct examinations at the end of the High School courses, to admit candidates to the examinations and to publish the results of those examinations; and under section 15 it has power to make regulations

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for the purpose of carrying into effect the provisions of the Act. The Board has, in exercise of that power, made a large number of regulations which, for the purpose of convenience, are divided into chapters. Chapter XII deals with examinations, and we are concerned in particular with reg. 4 and clauses (i), (ii), (v) and (xii) of regulation 5, which read as follows:

*"Rules for Admission of Regular Candidates—*

4. (1) Every candidate sent up by a recognised institution for admission to an examination held by the Board shall, not later than the first of November each year—

(a) pay the fee prescribed for the examination, and

(b) state the subject or subjects which he/she offers for the examination.

(2) The head of the institution shall furnish the Secretary with the following certificates showing:

(i) that his/her admission to the institution is in accordance with the rules of the Education Code and the regulations of the Board;

(ii) that he/she has completed a regular course of study in a recognized institution;

(iii) that he/she has actually performed the experiments laid down in the syllabus (only for candidates offering Science or Biology at the High School Examination).

*Attendance and Number of Meetings—*

5. (i) A recognized institution shall remain open for "at least 220 working days" including examination and extra-curricular activities.

(ii) No candidate shall be presented for the High School Examination by a recognized institution, unless he/she has been present in classes IX and X for at

least 75 per cent of the days the institution was open during two academical years.

\* \* \*

(v) In the case of failed or detained candidates of the High School or Intermediate Examination of the Board, the percentage shall be calculated for one academical year only. The attendance put in during the academic year at the end of which the candidate wishes to appear shall be calculated. The term "detained" means detained for any cause either at the High School or the Intermediate Examination.

\* \* \*

(xii) The rule regarding minimum attendance shall be strictly enforced. The head of a recognized institution may condone a deficiency in attendance of not more than (a) ten days in the case of a candidate for the High School Examination and (b) ten lectures (including periods of practical work, if any), given in each subject in the case of a candidate for the Intermediate Examination. All cases in which this privilege is exercised shall be reported to the Director of Education as the Chairman of the Board.

In the cases of failed candidates whose attendance of one year will be taken into account, the shortage to be condoned shall be reduced to half."

Now it is not in dispute that the petitioner's attendance was short by 17 days of which 5 days could be condoned by the Principal of his College under the last two clauses which we have cited. There was, therefore, a shortage of 12 days which the Principal had no power to condone, and it is common ground that in these circumstances the Principal ought not to have allowed the petitioner to sit for the examination.

The appellants' case, shortly stated, is that as the petitioner had not attended the prescribed number of

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classes, he was not eligible to appear at the Examination and the Board was entitled, and, indeed, had no alternative but to cancel his examination. For the petitioner it is contended that as he was permitted by the Board to sit at the Examination, the Board was bound to publish the result of his examination, and if he had passed the Examination, the Board was bound to issue a certificate to him to that effect.

The argument before us has turned mainly on the question of the meaning and effect of regulation 5(ii) of Chapter XII of the Regulations. The learned Judge, who had considered the matter with great care and who delivered a very full judgment, was of the opinion that clauses (i) and (ii) of regulation 5 must be considered together and that as it was admitted before him that clause (i) of that regulation was merely directory it followed that clause (ii) was not a mandatory provision. The learned Judge accordingly held that as the Board had permitted the petitioner to sit at the Examination, it was not thereafter entitled to cancel his examination on the ground that there had been a contravention of the provisions of this clause. The second question which has been argued before us is whether, assuming the provisions of clause (ii) to be mandatory, the Chairman of the Board had any power under the Act to cancel the petitioner's examination. The learned Judge held that he had not.

It is convenient at this stage to make some reference to the circumstances in which the High School Examination is held and to the procedure which is admittedly followed by the Board in connection therewith. The Examination is held annually in the months of March and April. The number of candidates is very large; in 1956 it exceeded 2 lakhs. In view of the large number of candidates applications for admission to the examination have, under regulation 4(1) of Chapter XII, to be

made not later than the 1st November of the year preceding that in which the examination is to be held. In his application the candidate is required to state the subject or subjects which he offers for examination and he must at the same time pay the prescribed fee. The head of the institution which the candidate attends must also furnish the Board with a certificate that the candidate (1) has been admitted to the institution in accordance with the rules of the Education Code and the Regulations of the Board, (2) that he has completed a regular course of study, and (3) in the case of candidates offering Science or Biology at the Examination, that he has actually performed the experiments laid down in the syllabus. Regulation 25 of Chapter XII provides that—

“The Secretary shall after satisfying himself that a candidate has complied with all the requirements for admission to an examination of the Board, furnish the candidate with a card of admission on presentation of which to the Superintendent of the Examination Centre concerned the candidate shall be permitted to sit for the examination.”

In view of the number of candidates taking the examination, the practice of the Board is for the Secretary, shortly before the examination is to commence, to send to the Principal of every institution admission cards for all candidates from that institution, whose application forms are in order, who have paid the prescribed fee and in respect of whom the necessary certificates have been furnished. In many cases a candidate will not by the 1st November have attended the institution for the number of days prescribed by regulation 5(ii). Such candidates may, however, have made good the deficiency by the date on which the examination commences, and accordingly principals of institutions are strictly enjoined by the Board not to issue admission cards to such

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candidates unless, prior to the date upon which the examination commences, the deficiency has been made good. The Board thus places upon the principals of institutions the responsibility of issuing admission cards only to those candidates who have attended the institution for the prescribed number of days.

Now the petitioner's shortage of attendance appears to have been due, in part at least, to illness, and on the 17th Mach, 1956, that is, on the day preceding the commencement of the examination, the petitioner's father had an interview with the Principal of the Agarsen Intermediate College at which it appears the father asked the principal to allow the petitioner to sit at the examination, notwithstanding his shortage of attendance. The principal acceded to this request, but he gave the petitioner's father a letter which reads as follows:

"You had already been informed that the percentage of attendance of your ward has fallen short. I perused the M. C. produced by you declaring and testifying the illness of your ward and his unfitness to attend College. I hereby permit him to sit at the next ensuing Board's Examination only provisionally. Should he be disallowed by the authorities to sit at this Examination in the course of the Examination or after it, or if his results are withheld on this account, I shall take no responsibility, but it will be the responsibility of your ward and yourself."

The principal then gave the petitioner his admission card. It was in these circumstances that the petitioner sat at the examination. After the examination had been held, but before the results were declared, the fact that the petitioner had not attended his college for the prescribed number of days became known to the Board. As it was not within the powers of the Examination



Committee to cancel the petitioner's examination on the ground of shortage of attendance, [as held by this Court in *Jitendra Kumar Gupta v. Board of High School and Intermediate Education* (1)], the Chairman of the Board took this action in the exercise of his emergency powers under section 11(3) of the Act.

It was urged in argument before us that the provision in Regulation 5(ii) of Chapter XIII requiring a candidate to have attended his institution for a prescribed number of days was not a condition of his eligibility to sit for the High School Examination. The learned Judge was of opinion that clauses (i) and (ii) of this Regulation have the same object and are of the same nature and character, and that.

"Neither of them is mandatory to this extent that it takes away the powers of the Board to admit candidates to sit in the examination in spite of shortage of attendance."

The learned Judge then proceeded to consider whether the Board had admitted the petitioner to sit for the examination, notwithstanding his shortage of attendance and he stated his conclusion in these words:

"The petitioner was suffering from shortage of attendance due to illness. He made an application to the Principal for condonation of this shortage. The Principal condoned the shortage and presented him for examination. The Board might have detained him in spite of presentation by the Principal but it never did. Instead, it presented him with an admission card and permitted him to sit in the examination. The Board, as such, shall be deemed to have condoned the shortage. The petitioner's examination is not a nullity. On the contrary, it gives him the right to have his result declared."

(1) 1956 A.L.J. 625.

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It is not necessary for us to consider whether the Board is possessed of the power to admit to its examinations a candidate whose attendance is short, for we are unable, with respect, to agree with the learned Judge that the Principal or the Board condoned the petitioner's shortage of attendance. We do not think that either did so.

There can be no doubt on the facts of the present case that the petitioner and his father were well aware of the provisions of Regulation 5 and that it was because of the shortage of his son's attendance that the petitioner's father saw the Principal of the Agarsen Intermediate College on the 17th March, 1956. The Principal was clearly reluctant, as well he might be, to give the petitioner his admission card and when ultimately he agreed to do so he made it clear, as is evident from the letter he then gave to the petitioner's father, that the permission to sit was provisional. The Principal in our opinion did not condone or purport to condone the admitted shortage in the petitioner's attendance. He knew that he had no power to do so. What he did was to permit the petitioner to sit for the examination upon the understanding that that permission would not in any way fetter the power of the Board to disallow him to sit or to withhold his result. In effect what the Principal said was "Your son's attendance is short. This is a hard case and I shall let him sit for the examination and leave it to the Board to decide whether the shortage should be condoned." Had there then been time to refer the matter to the Board, there can be no doubt that the latter would have refused to allow the petitioner to sit for the examination; but there was no time as the petitioner's examination started on the following day, and the Board did not become aware of the facts until after the examination concluded. When it became aware of the facts, the Board did not condone the petitioner's shortage of attendance; it cancelled his exami-

nation. This letter of the 17th March, 1956, is important, for it makes clear the conditions under which the petitioner was permitted by his Principal to sit for the examination; and it is a feature of this case, which has not been satisfactorily explained, that that letter is not mentioned in the petition, nor is there any reference made to it in the affidavit accompanying the petition which was sworn by the petitioner's father.

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Learned counsel for the petitioner, however, contends that, even if the Board did not condone the petitioner's shortage of attendance, the petitioner was permitted to sit for the Examination and the Board could not thereafter cancel it on the ground that he had not attended his College for the prescribed number of days. This brings us back to the question of the meaning and effect of clauses (ii) and (v) of Regulation 5 of Chapter XII. The regulations in this chapter have not been well drafted and, as the learned Judge has pointed out, it is frequently hard to distinguish those regulations which are mandatory and those which are merely directory. Now in order to ascertain the effect of clauses (ii) and (v) of Regulation 5, those clauses must be examined in the background of the other provisions of Chapter XII, and when so examined, we think that the answer to the problem becomes reasonably clear. It is first to be observed that the regulations in Chapter XII make provision, *inter alia*, for the admission to the Board's examinations of two classes of candidates, namely, regular candidates, that is, candidates who have attended a regular course of study in a recognized institution, and private candidates, who are "persons seeking admission to an examination without putting in the requisite amount of attendance prescribed for it at an institution recognized by the Board", (Reg. 8). The basic distinction between these two classes of candidates is that the former have, and the latter have not, attended a recogniz-

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ed institution for a particular period. It is *prima facie* to be expected, therefore, that the Board must be satisfied in the case of a regular candidate that he has attended a recognized institution for the period prescribed. Secondly, it is to be observed that whereas private candidates offer themselves for examination, [Reg. 8(i)], regular candidates do not do so: they are 'sent up' [Reg. 4 (i)], or 'present', [Reg. 5 (ii)], by the institution which they attend. The presentation for the Examination is by the institution, and in our view clauses (ii) and (v) of Regulation 5 impose an obligation on every recognized institution to send up for the High School Examination only such candidates who have attended the institution for the prescribed number of days. If, notwithstanding the fact that a candidate has not attended the institution for the prescribed period, the institution sends him up for the Examination, then he has not been duly presented, and in our opinion the Board is not under any obligation to examine him, or, if it has in ignorance of the fact examined him, to declare the result of that examination. Viewed in this light, we consider that clauses (ii) and (v) of Regulation 5 are mandatory provisions inasmuch as they impose an obligation, not on the candidate, but on the institution which he attends. If a candidate is presented by his institution in defiance of the provisions of clause (ii) or of clause (v) of Regulation 5, such a candidate in our opinion acquires no right in law to compel the Board to declare the result of his examination unless the Board has condoned the infraction of this Regulation.

We hold, therefore, that the petitioner was not eligible to sit for this Examination. What course was then open to the Board? The petitioner says that notwithstanding the ineligibility, the Board must assess his papers, and if he has secured sufficient marks it must declare that he was successful at the examination. We are

unable to agree with this submission. Section 7 of the Act enumerates the powers of the Board, and they include a residuary power—

“(12) To do all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising High School and Intermediate Education.”

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With this section must be read section 14 which enacts that—

“(14) All matters relating to the exercise by the Board of powers conferred upon it by this Act which have by regulation been delegated by the Board to any one of its committees shall stand referred to that committee, and the Board, before exercising any such powers, shall receive and consider the report of the committee with respect to the matter in question.”

Now the Board has delegated to the Examination Committee wide powers in relation to the holding of examinations, but it is common ground that that Committee has not had conferred upon it power to cancel a candidate's examination on the ground that he was not eligible to sit for the examination on account of shortage of attendance. The power possessed by the Board to regulate and supervise High School Education undoubtedly includes the power to regulate and supervise the High School Examination and the power relating to such a matter which has not been delegated to the Examination Committee can accordingly be exercised by the Board without its first having to receive and consider a report by that Committee with regard to the particular matter in question. In our opinion it was within the power of the Board to cancel the examination of the petitioner, and the only question is whether that power was rightly exercised by the Chairman.

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Section 11 of the Act specifies the Chairman's powers, and so far as is material it reads thus—

"11. (1) It shall be the duty of the Chairman to see that this Act and the Regulations are faithfully observed and that he shall have all powers necessary for this purpose.

(3) In any emergency arising out of the administrative business of the Board which in the opinion of the Chairman requires that immediate action should be taken the Chairman should take such action as he deems necessary and shall thereafter report his action to the Board at its next meeting."

The Board consists of the Chairman, the Secretary and 37 members and ordinarily it meets in the months of February and November, (Chapter II of the Regulations). A decision whether the petitioner's examination should be cancelled or not was obviously one about which there should be no avoidable delay. The examination was held in the months of March and April, and unless a special meeting was convened by the Chairman, the Examination Committee would not meet until the following November. In such circumstances we are not prepared to hold that the Chairman was not justified in taking the action he did in the exercise of his emergency powers under section 11(3).

This appeal must, therefore, be allowed. The order of the learned Judge is set aside, and the Board is entitled to its costs before the learned Judge and on appeal.

*Appeal allowed.*

## SUPREME COURT

## APPELLATE CIVIL

*Before Mr. Justice Imam, Mr. Justice Das and Mr.  
Justice Kapur.*

JAGDISH PRASAD CHAUBEY AND ANOTHER  
(APPELLANTS)

*v.*

GANGA PRASAD CHATURVEDI—(RESPONDENT)

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD] 1958  
December, 5

**Civil Procedure Code, 1908, s. 115—Revision—Power when to  
be exercised—Fact when to be interfered with—Jurisdictional  
fact.**

The power of the High Court to interfere under s. 115, Civil Procedure Code, 1908, becomes operative if an erroneous decision of a subordinate court resulted in its exercising jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested or acting with material irregularity or illegality in the exercise of its jurisdiction.

A suit filed by a landlord under s. 5(4) of the U. P. Temporary Control of Rent and Eviction Act, 1947, on the allegation that he had constructed a portion of the accommodation anew was only maintainable if it was based on the inadequacy of the reasonable annual rent and for that purpose the necessary jurisdictional fact to be found was the date of the construction of the accommodation and if the court wrongly decided that fact and thereby conferred jurisdiction upon itself which it did not possess, it exercised jurisdiction not vested in it and the High Court had power to interfere under s. 115 and it could then determine whether the question of the date of construction was rightly or wrongly decided.

Case-law discussed.

Civil Appeal No. 153 of 1955, from a judgment and decree, dated the 30th August, 1954, of the Allahabad High Court in Civil Revision No. 540 of 1951.

The facts appear in the judgment.

G. C. Mathur, Advocate, for the appellants.

C. B. Aggarwala, Senior Advocate, (Ganpat Rai, Advocate, with him), for the respondent.

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The followig Judgment of the Court was delivered by—

KAPUR, J. :—This is an appeal by special leave against the decision of the High Court of Judicature at Allaha-bad passed in revision under section 115 of the Code of Civil Procedure. The landlord who was the plaintiff in the trial court is the appellant before us and the tenant who was the defendant is the respondent.

The facts of this appeal are that in 1938 the respon-dent took on rent the accommodation in dispute which is termed a 'tal' on a monthly agreed rent of Rs.21-4 and was using the same for the purpose of stacking timber. A portion of it was a covered godown which had three walls and a kucha roof. On 28th January, 1950, the appellant made an application to the House Allotment Officer under section 3-A of the U. P. Tem-porary Control of Rent and Eviction Act, (U. P. III of 1947) (hereinafter termed the Act) for the fixation of "reasonable annual rent" of the accommodation in dis-pute. He therein alleged that in January, 1949, he had "constructed anew" a big godown 80 × 25 × 11 feet according to the instructions of the respondent and expended a fairly large sum of money on it and was, therefore, entitled to a monthly rent of Rs.165. The House Allotment Officer fixed on the 18th February, 1950, the rent at Rs.35 per mensem, which on review was raised on 25th May, 1950, to Rs.40 per mensem. He held that the accommodation was not a newly constructed accommodation as the respon-dent had been a tenant from 1938. He determined the increase of rent on the basis of the building that was added by the new construction. He also held that:

"The cost of land, the floor area of godown and rent of other similar premises would be irrelevant as all of these existed before new construction and were included in rent before new construction."



The appellant thereupon instituted a suit on the ground of inadequacy of the reasonable annual rent under section 5(4) of the Act alleging that he had constructed the portion of the accommodation "anew" and put up ferro-concrete roof, 80 x 25 feet, and that the construction was undertaken at the request of the respondent who had agreed to pay enhanced rent but had refused to do so; that although the House Allotment Officer, Mathura, had fixed the rent of the accommodation at Rs.35 which was subsequently raised to Rs.40 per mensem, the proper rent should not be less than Rs.115 per mensem and, therefore, prayed for the enhancement of "reasonable annual rent". The defence was that there was no construction at the request of the respondent but it had been undertaken in order to put up another storey on the top of the old building; that as far as the accommodation in possession of the respondent was concerned there was no new construction of accommodation after 30th June, 1946; that the ferro-concrete roof had in no way benefitted him, on the other hand, the space at his disposal had diminished because of the number of pillars constructed and the lowering of the roof. He also pleaded that the suit was not maintainable under the Act and that no suit could be filed "after the order of the House Allotment Officer". The relevant issues raised were:

(1) "Whether the suit is not maintainable in view of any provisions of the Act No. 3 of 1947?"

(2) Whether the suit after the fixation of rent by the House Allotment Officer is not maintainable?

\* \* \*

(5) What should be the reasonable and proper rent of the accommodation in suit?"

The learned Additional Civil Judge found that the suit was not barred because of the Act; that the suit against the order of the House Allotment Officer was

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maintainable; that newly constructed accommodation on the whole was bigger and more spacious than the old kacha hall and that the accommodation had increased and after taking into consideration the amount spent on the construction, he increased the "reasonable adequate rent" to Rs.55-8.

Against this decree of the learned Judge the respondent took a revision to the High Court under section 115 of the Code of Civil Procedure. The High Court was of the opinion that if the accommodation was a new construction erected after 30th June, 1946, the suit was maintainable and the High Court could not interfere with the finding of the Civil Judge as to the amount of rent. If, on the other hand, the construction was an old one, the suit did not lie and the agreed rent would continue to be payable. It also held that the construction on the upper storey was a new construction but as far as the accommodation in the occupation of the respondent was concerned, the construction could not be called new construction and, therefore, section 3-A was not applicable and as no suit lay at the instance of the landlord to have the agreed rent enhanced, the tenant was only liable to pay the agreed rent and no more. The revision petition was, therefore, allowed and the suit of the appellant was dismissed.

The main controversy raised between the parties was whether the High Court could, in revision under section 115 of the Code of Civil Procedure, interfere with this decision of the trial court. The respective contentions were these: The appellant contended that it was within the jurisdiction of the Additional Civil Judge to decide the question of the date of construction of the accommodation and in doing so he could decide rightly or wrongly as the matter was within his jurisdiction and, therefore, the High Court had no power to interfere merely because in its opinion the

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decision was erroneous. In other words, this question was merely one of the facts in issue between the parties unconnected with jurisdiction. He also contended that the House Allotment Officer having decided in his favour the question of the date of construction which section 3-A of the Act authorises him to decide, his right to bring the suit was established and, therefore, the High Court could not in revision under section 115, Civil Procedure Code, go into the correctness of that decision. The respondent's counsel, on the other hand, submitted that the decision of the Court as to the date of construction was in this case a jurisdictional fact, i.e., a fact which went to the root of the jurisdiction of the Court because unless the accommodation was held to have been a new construction made after 30th June, 1946, the appellant would be bound by the agreed rent and would have no right of suit under section 5(4) and the Court would have no jurisdiction to entertain the suit. In order to decide the question at issue, it is necessary at this stage to refer to the scheme of the Act. The object of the Act was to control letting and the rents of residential and non-residential accommodations.

"Accommodation" was defined in section 2(a) as follows:

2. (a) "accommodation means residential and non-residential accommodation in any building or part of the building and includes....."

"Reasonable annual rent" is defined in section 2(f):

2(f) "Reasonable annual rent in the case of accommodation constructed before 1st July, 1946, means—

(1) if it is separately assessed to municipal assessment its municipal assessment plus 25 per cent. thereon;

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(2) if it is a part only of the accommodation so assessed, the proportionate amount of the municipal assessment of such accommodation plus 25 per cent. thereon;

(3) if it is not assessed to municipal assessment—

(i) but was held by a tenant on rent between 1st April, 1942 and 30th June, 1946, fifteen times the rent of one month nearest to and after 1st April, 1942 and;

(ii) if it was not so held on rent, the amount determined under section 3-A.

and in the case of accommodation constructed on or after 1st July, 1946, means the rent determined in accordance with section 3-A”.

As to how reasonable annual rent of a building was to be determined was provided for in section 3-A:

Section 3-A “(1) In the case of any accommodation constructed after 30th June, 1946, or falling under sub-clause (ii) of clause (3) of sub-section (f) of section 2, the District Magistrate may, on the application of the landlord or the tenant, determine the reasonable annual rent thereof.

(2) In determining the reasonable annual rent under sub-section (1) the District Magistrate shall take into account—

(a) If the accommodation was constructed after 30th June, 1946, the cost of construction and of maintenance and repairs of the accommodation, its situation and any other matter, which, in the opinion of the District Magistrate, is material and

(b) if it is accommodation—

(i) falling under clause (2) or sub-clause (i) of clause (3) of sub-section (f) of section 2, the principles therein set forth, and

(ii) falling under sub-clause (i) of clause (3) of sub-section (f) aforesaid, the principles set forth in clause (a) of sub-section (1) of section 6.

(3) Subject to the result of any suit filed under sub-section (4) of section 5, the rent fixed by the District Magistrate under this section shall be the annual reasonable rent of the accommodation."

"Agreed rent" was defined in section 5(1) of the Act to be ".....the rent payable for any accommodation to which this Act applies shall be such as may be agreed upon between the landlord and the tenant".

Section 5(4) of the Act provided:

"If the landlord or the tenant, as the case may be, claims that the annual reasonable rent of any accommodation to which the Act applies is inadequate or excessive, or if the tenant claims that the agreed rent is higher than the annual reasonable rent, he may institute a suit for fixation of rent in the Court of the Munsif having territorial jurisdiction, if the annual rent claimed or payable is Rs.500 or less, and in the Court of the Civil Judge having territorial jurisdiction if it exceeds Rs.500, provided that the Court shall not vary the agreed rent unless it is satisfied that the transaction was unfair, and in the case of lease for a fixed term made before 1st April, 1942, that the term has expired".

Section 6 provided for the procedure as follows:

(1) "In determining the amount of annual or monthly rent in any suit under section 5 the Court shall take into account—

(a) in the case of accommodation constructed before 1st July, 1946, the pre-war rent, the reasonable annual or monthly rent, the prevailing rent on the date of the suit for similar accommodation in the locality, the cost of maintenance and repairs of such accommodation and any material circumstances proved by the plaintiff or the defendant,

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(b) in the case of accommodation constructed on or after 1st July, 1946, the cost of construction and of maintenance and repairs of accommodation, its situation and any other circumstances which the Court may consider material.

(2) No appeal shall lie from any decree or order of the Munsiff or the Civil Judge in a suit brought under sub-section (4) of section 5:

Provided that (except as regards the rate of rent but no further) the decree or order so passed shall not operate as *res judicata* between the parties or their representatives-in-interest in any suit or proceedings under any other law".

It is not necessary to refer to other sections of the Act.

The Act, therefore, in the preamble sets out the objects of the Act. In section 2(a) it defined the meaning of the word 'accommodation' to mean residential and non-residential accommodation in any building or part of the building, and in section 2(f) it laid down in three parts what the reasonable annual rent was, one part dealing with accommodation constructed before 1st July, 1946, and assessed to municipal assessment, the second part with accommodation so constructed and not assessed to municipal assessment but held by a tenant between 1st April, 1942, and 30th June, 1946, and the third part with accommodation constructed on or after 1st July, 1946, and these last two were to be determined in accordance with the provisions of section 3-A which empowered the District Magistrate to do so. Sub-section (1) of this section gave power to the District Magistrate to determine the reasonable annual rent in the case of accommodation constructed after 30th June, 1946, or falling under cl. (ii) of sub-section 3 of section 2(f), i.e., if it was not assessed to municipal assessment though constructed before 1st July, 1946, and was not held by a tenant between 1st April, 1942, and 30th June,

1946. Sub-section 2 of section 3-A laid down the factors to be taken into consideration in determining the reasonable annual rent and under sub-section 3 the rent so fixed was to be the annual reasonable rent of the accommodation but this was subject to the result of a suit filed under section 5(4). Therefore, under section 3-A the District Magistrate was entitled to determine the amount of reasonable annual rent when either of the two facts on which his power depended was shown to exist, i.e., (1) the accommodation was constructed after 30th June, 1946, or (2) although it existed previously, it was not assessed to municipal assessment and had not been held by a tenant on rent between 1st April, 1942, and 30th June, 1946. The District Magistrate's power to determine the rent under section 3-A, therefore, was not confined to accommodation constructed after 30th June, 1946, alone. The rent determined by the District Magistrate under section 3-A was the reasonable annual rent under the Act subject to the result of any suit filed under sub-section (4) of section 5. A wrong decision by the District Magistrate under section 3-A or an order made by him in excess of his powers under that section could be rectified by a suit under section 5(4).

This provision of the Act, i.e., section 5(4) provided for three classes of suits, one by a landlord that the reasonable annual rent was inadequate and (2) by the tenant that the annual rent was excessive and (3) also by the tenant that the agreed rent was higher than the reasonable annual rent. Hence under this section the appellant landlord's right of suit was restricted to challenging the inadequacy of the reasonable annual rent but he could not sue for varying the agreed rent. The appellant in the present case brought his suit on the ground of inadequacy of the reasonable rent as determined under section 3-A and consequently its maintainability depended on the determination of the juris-

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ditional fact, i.e., date of its construction, whether it was before or after 30th June, 1946, on the decision of which would depend his right to bring the suit; because if there was no new construction, the agreed rent would be operative and the appellant would have no right of suit under section 5(4) of the Act.

Consequently, by wrongly deciding this question, the court would be entertaining a suit by the landlord for enhancement of the agreed rent and thereby assuming jurisdiction it did not possess and the landlord would be circumventing the restriction on his right to sue for enhancement of agreed rent which the law did not allow.

As the issues raised show the learned Additional Civil Judge was alive to the fact that the maintainability of the suit depended on the determination of this question. The appellant had specifically alleged that the accommodation had been constructed after 30th June, 1946, a fact which was denied by the respondent: That gave rise to the first two issues and the learned Civil Judge held:

"I am, therefore, of the opinion that that portion of the building in suit which has been newly replaced must be treated as a new accommodation, and hence this court can determine its rent under the provisions of section 5(4). In view of the fact that it is a new accommodation no question of agreed rent arises and the landlord can bring a suit for fixation of rent".

Two facts, therefore, stand out clearly in the judgment of the trial court (1) that it was the existence of a newly constructed accommodation which gave jurisdiction to the court to determine its reasonable annual rent and (2) that as it was a newly constructed accommodation, the question of agreed rent did not arise.



The High Court, in our view, approached the question quite correctly when it stated that the question for determination was whether the accommodation had been constructed before or after 30th June, 1946, and that if it was constructed before that date the suit was incompetent and if after, the suit would lie. The contention raised by the appellant in this Court was that the decision of the trial court as to whether the accommodation was constructed before or after 1st July, 1946, cannot be challenged in revision in the High Court and he relied on the following observation of Lord ESHER, M. R., in the *Queen v. Commissioner for Special Purposes of the Income Tax* (1):

“When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction they give them, whether there shall be

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any appeal from their decision, for there will be none. In the second of two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction".

These observations which relate to inferior courts or tribunals with limited jurisdiction show that there are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists. In the present case the appellant asked for a determination of reasonable annual rent under section 3-A on the ground that the accommodation was constructed after 30th June, 1946, and the House Allotment Officer, therefore, had power to determine the reasonable annual rent.

In order to give jurisdiction to the Civil court there had to be in existence a reasonable annual rent as defined under section 2(f) whether it fell within its first two clauses or was determined under section 3-A. The reasonable annual rent could be varied at the instance

of the landlord or the tenant on the ground of its inadequacy or excess but the landlord could not bring a suit to vary the agreed rent nor could the court entertain such a suit although it was open to the tenant to do so and the court could at his instance entertain such a suit. The proceedings before the Civil court are not by way of an appeal from any order under section 3-A made by the District Magistrate.

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Section 115, Civil Procedure Code, empowers the High Court, in cases where no appeal lies, to satisfy itself on three matters: (a) that the order made by the subordinate court is within its jurisdiction; (b) that the case is one in which the court ought to exercise its jurisdiction; (c) that in exercising the jurisdiction the court has not acted illegally, that is, in breach of some provision of law or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. *Per* Sir JOHN BEAUMONT in *Venkatagiri Ayyangar v. Hindu Religious Endowment Board, Madras* (1). Therefore, if an erroneous decision of a subordinate court resulted in its exercising jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested or acting with material irregularity or illegality in the exercise of its jurisdiction, the case for the exercise of powers of revision by the High Court is made out. In *Joy Chand Lal Babu v. Kamalaksha Chaudhury* (2), the subordinate court gave an erroneous decision that the loan was a commercial loan and, therefore, refused to exercise jurisdiction vested in it by law and the Privy Council held that it was open to the High Court to interfere in revision under section 115. SIR JOHN BEAUMONT said at p. 142:

"There have been a very large number of decisions of Indian High Courts on section 115 to

(1) (1949) L.R. 76 I.A. 67, 73. (2) (1949) L.R. 76 I.A. 131.

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many of which their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate courts exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored. The cases of *Babu Ram v. Munnalal* (1) and *Hari Bhikaji v. Naro Vishvanath* (2) may be mentioned as cases in which a subordinate court by its own erroneous decision, (erroneous that is, in view of the High Court), in the one case on a point of limitation and in the other on a question of *res judicata*, invested itself with a jurisdiction which in law it did not possess; and the High Court held, wrongly their lordships think, that it had no power to interfere in revision to prevent such a result. In the present case their Lordships are of the opinion that the High Court, on the view which it took that the loan was not a commercial loan had power to interfere in revision under sub-section (b) of section 115".

In *Keshardeo Chamria v. Radha Kissen Chamria* (3) both these judgments of the Privy Council as also the previous judgments in *Rajah Amir Hassan Khan v. Sheo Baksh Singh* (4) and *Balakrishna Udayar v. Vasudeva Aiyar* (5) were reviewed and it was held that section 115, Civil Procedure Code, applies to matter of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. Thus if a sub-

(1) (1927) I.L.R. 49 All. 454.

(2) (1885) I.L.R. 9 Bom. 432.

(3) 1958 S.C.R. 136.

(4) (1884) L.R. 11 I.A. 237.

(5) (1917) L.R. 44 I.A. 261.

ordinate court had jurisdiction to make the order it made and has not acted in breach of any provision of law or committed any error of procedure which is material and may have affected the ultimate decision, then the High Court has no power to interfere. But if, on the other hand, it decides a jurisdictional fact erroneously and thereby assumes jurisdiction not vested in it or deprives itself of jurisdiction so vested, then the power of interference under section 115, Civil Procedure Code, becomes operative.

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The appellant also relied, on *Rai Brij Raj Krishna v. S. K. Shaw and Bros.* (1) where this Court quoted with approval the observations of Lord Esher in *Queen v. Commissioner for Special Purposes of the Income Tax* (2) and *The Colonial Bank of Australia v. Willan* (3) where Sir JAMES COLVILLE said:

"Accordingly the authorities.....establish that an adjudication by a Judge having jurisdiction over the subject matter is, if no defect appears on the face of it, to be taken as conclusive of the facts stated therein and that the Court of Queen's Bench will not on *certiorari quash* such an adjudication on the ground that any such fact, however essential, has been erroneously found".

But these observations can have no application to the judgment of the Additional Civil Judge whose jurisdiction in the present case is to be determined by the provisions of section 5(4) of the Act. And the power of the High Court to correct questions of jurisdiction is to be found within the four corners of section 115, Civil Procedure Code. If there is an error which falls within this section, the High Court will have the power to interfere, not otherwise.

(1) 1951 S.C.R. 145.

(2) L.R. [1888] 21 Q.B. 313, 319.

(3) (1874) L.R. 5 P.C. 417, 443.

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The only question to be decided in the instant case is as to whether the High Court had correctly interfered under section 115, Civil Procedure Code, with the order of the Civil Judge. As we have held above, at the instance of the landlord the suit was only maintainable if it was based on the inadequacy of the reasonable annual rent and for that purpose the necessary jurisdictional fact to be found was the date of the construction of the accommodation and if the court wrongly decided that fact and thereby conferred jurisdiction upon itself which it did not possess, it exercised jurisdiction not vested in it and the matter fell within the rule laid down by the Privy Council in *Joy Chandlal Babu v. Kamalaksha Chaudhary* (1). The High Court had the power to interfere and once it had the power it could determine whether the question of the date of construction was rightly or wrongly decided. The High Court held that the Civil Judge had wrongly decided that the construction was of a date after 30th June, 1956, and, therefore, fell within section 3-A.

In these circumstances the appeal must fail and is dismissed with costs throughout.

*Appeal dismissed.*

(1) (1949) L.R. 76 I.A. 131.

## CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava and Mr. Justice Chaturvedi

SITA RAM KAYAN (APPLICANT)

v.

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December 10.

COMMISSIONER OF INCOME-TAX

(OPPOSITE-PARTY)

**Excess Profits Tax**—*Deficiency of profits in new business—Excess profits earned in the old business—Right of assessee to claim set off—Excess Profits Tax Act, 1940, ss. 2(5), 5 and 7.*

The scheme of the Excess Profits Tax Act is to allow one single owner, carrying on more than one business during the whole period in which liability to excess profits tax is imposed by the Act, the benefit of adjustment of his deficiency in any of the chargeable accounting periods against the excess profits in any other chargeable accounting period.

Wherefore, if a person closes the business in one chargeable accounting period and after some time starts a new business in another chargeable accounting period, the two constitute one business under the second proviso to cl. (5) of s. 2 of the Excess Profits Tax Act, 1940 and the assessee is entitled to utilize the deficiency of profits in the latter for reducing the chargeable profits in the former, whether taxed or yet to be taxed.

*John Smith & Son v. Moore* (H. M. Inspector of Taxes) (1), distinguished.

Indian and English law on the point contrasted.

Income-tax Miscellaneous Case No. 219 of 1957.

The facts appear in the judgment.

*R. L. Gulathi*, for the applicant.

*Jagdish Swarup*, for the opposite-party.

The judgment of the Court was delivered by—

BHARGAVA, J: The following question has been referred by the Income Tax Appellate Tribunal for the opinion of this Court:

“Whether on the above facts and the findings of the Tribunal, the assessee is entitled to claim deficiency attributed to the chargeable accounting period under consideration against the excess profits in the preceding chargeable accounting periods?”

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The assessee is an individual who was carrying on business in cloth and cotton. During the chargeable accounting period commencing from 8th November, 1942, and ending on 30th September, 1943, he was assessed to excess profits tax. On 30th September, 1943, the assessee closed his business and went to his place of origin. He returned to the place where he was carrying on the business and then on 24th March, 1944, he started a new business in cloth and cotton. This business was carried on up to 28th May, 1945. During this period between 24th March, 1944, and the 28th of May, 1945, the assessee earned profits which were far below the standard profits of his earlier business which had been assessed to the excess profits tax mentioned above. The assessee claimed that the deficiency of profits in his business, which was run between the 24th of March, 1944, and 28th May, 1945, should be set off for the purpose of reducing the excess profits tax which had been assessed on his business for the chargeable accounting period from 8th November, 1942, to 30th September, 1943. One of the contentions of the assessee was that, when he started the business on 24th March, 1944, he did not start a new business at all and that it was a continuance of his old business. This contention was rejected by the Income-Tax Appellate Tribunal, which held that it was really a new business. According to the statement of the case sent up by the Tribunal, this finding of the Tribunal was not challenged by learned counsel for the assessee before the Tribunal when the application under section 66 (1) of the Income-tax Act, read with section 21 of the Excess Profits Tax Act, was argued. Further, as remarked by the Tribunal, this was a finding of fact. Accepting this finding of fact, however, it was contended by the assessee that he was still entitled to deduct the deficiency of profits in his new business out of the excess profits



which had been earned by him and on which tax had been charged during the chargeable accounting period from 8th November, 1942, to 30th September, 1943. In these circumstances, the Tribunal has described the period beginning on 24th March, 1944, and ending on 28th May, 1945, as the chargeable accounting period under consideration and the period between 8th November, 1942, and 30th September, 1943, has been described as the preceding chargeable accounting period. It is on the basis of this description that the question has been framed by the Tribunal in the form reproduced above.

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On behalf of the assessee, reliance has been placed on the provisions of sections 5 and 7 of the Excess Profits Tax Act and, further, on the second proviso to clause (5) of section 2 of the Excess Profits Tax Act.

The contention of the assessee is that the business, which was carried on during the preceding chargeable accounting period, was governed by the provisions of the Excess Profits Tax Act by virtue of section 5 of that Act and that, in fact, excess profits tax was assessed and levied in respect of the profits of that business for that chargeable accounting period.

The business, which was run by the assessee between 24th March, 1944, and 28th May, 1945, was also governed by the provisions of this Act as the profits made in that business during the chargeable accounting period under consideration were chargeable to income-tax under clause (b) (i) or (ii) or clause (c) of sub-section (1) of section 4 of the Income-tax Act. Since the Excess Profits Tax Act applied to both these businesses carried on by the assessee, under the second proviso to clause (5) of section 2 of that Act, it must be held that these two businesses constituted one business. The two businesses being deemed to be one business, the assessee claimed

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that he was entitled under section 7 of the Excess Profits Tax Act to a deduction out of the profits charged to tax in the preceding chargeable accounting period to the extent of the deficiency of profits computed for the chargeable accounting period under consideration. On behalf of the Department, the contention is that the first business, which was carried on during the preceding chargeable accounting period, was discontinued at the end of that period and thereafter ceased to exist. Then a new business was started in the chargeable accounting period under consideration and this cannot now be held to be the same business, which had been carried on during the preceding chargeable accounting period. This must be held to be an entirely new business and, consequently, the deficiency in profits in respect of this business cannot be utilized for reducing the chargeable profits in the preceding chargeable accounting period. What was contended was that, in order to obtain this benefit, the business, which was carried on in the chargeable accounting period under consideration, should have been in existence even during the preceding chargeable accounting period and should have been continued as a running business subsequent to that period and also during the chargeable accounting period under consideration. The question that thus arises for decision may be put in simple language as follows:

"Q. Whether, if a person carried on a business in one chargeable accounting period and a new business in another chargeable accounting period, it can be held that the businesses constituted one business under the second proviso to clause (5) of section 2 of the Excess Profits Tax Act, or whether, as contended by the Department, there must be a necessary ingredient that the two businesses must be running simultaneously or must have run simultaneously?"

It seems to us that, on the language of the second proviso to clause (5) of section 2 of the Excess Profits Tax Act, the interpretation put on behalf of the assessee must be accepted. Under section 5 of the Excess Profits Tax Act, the Act applies to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax under clause (b) (i) or (ii) or clause (c) of sub-section (1) of section 4 of the Income-tax Act. The two businesses, which were carried on by the assessee during the two chargeable accounting periods in question, are both businesses covered by the provisions of section 5 of the Excess Profits Tax Act, so that the Excess Profits Tax Act applies to both of them. Further, both the businesses were admittedly owned by the same person, viz., the assessee. The second proviso to clause (5) of section 2 of the Excess Profits Tax Act lays down three requirements: Firstly, there should be a number of businesses, secondly, the Act should apply to all of them, and thirdly, they must be carried on by the same person. If these three requirements are satisfied, then the effect of the proviso is that all those businesses are treated as one business for purposes of the Excess Profits Tax Act. In the case before us, we have already held that both businesses, which were carried on by the assessee during the two chargeable accounting periods in question, attracted the applicability of the Excess Profits Tax Act under section 5 of that Act and both of them were carried on by the same person. In the circumstances, under the proviso, it must be held that they constituted one business. The contention of learned counsel for the Department that, for purposes of treating the two as one business, there should be continuity in running the businesses does not flow from any words used in this proviso. The proviso also does not lay down that, for purposes of treating several businesses as one business, they must all have been carried on simul-

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taneously during the same chargeable accounting period. Had this been the intention, the legislature could have easily introduced in this proviso also a reference to a chargeable accounting period as was done in section 5, which lays down the applicability of the Excess Profits Tax Act. The omission of any reference to a chargeable accounting period in this second proviso to clause (5) of section 2 of the Excess Profits Tax Act could only be for the purpose of bringing in a fiction of law that, if there be more than one business carried on by one person, then, for purposes of charging excess profits tax, all the businesses should be treated as one business and should be taxed on that basis. It is to be noticed that the Excess Profits Tax Act was passed for a limited period of time with a specific purpose. The purpose was to tax the excess profits made by businesses as a result of the war and the profits which were to be taxed were those which were earned during the period beginning from the first day of September, 1939, and ending on the 31st day of March, 1946. The scheme being only to tax the excess profits earned as a result of the war, the method of assessment laid down was not to restrict assessments to one single chargeable accounting period only and to fix the liability for payment of excess profits tax on the basis of the assessment of that period, but to allow to the assessee the benefit of having the excess profits earned by him spread over the whole period for which the Act was to be in force. It is true that, for the purpose of convenient assessment, the period, in respect of which the profits earned were to be taxed, was divided into separate chargeable accounting periods which were to be normally of 12 months' duration, though, ultimately, to be fixed in accordance with clause (1) of section 2 of the Excess Profits Tax Act. After the excess profits were computed for each chargeable accounting period and even if tax had already been realized for some of the chargeable accounting periods, the assessee

was given the benefit under section 7 of that Act of carrying back or carrying forward his deficiency of profits in any chargeable accounting period when the deficiency occurred during the preceding or subsequent chargeable accounting periods and of claiming a deduction in the excess profits, which either had already been taxed or were yet to be taxed. The result of this provision was that the assessee could lawfully claim a deduction in respect of deficiency suffered by him in any particular chargeable accounting period against excess profits earned in all other chargeable accounting periods. This would indicate that the intention of the Act was to charge with tax the excess profits earned over the whole period between the first day of September, 1939, and 31st day of March, 1946. This charge was to be in respect of a business and was not primarily directed against a person carrying on the business but, by adding the second proviso to clause (5) of section 2 of the Excess Profits Tax Act, the principle was partly departed from and cognizance was taken of the liability arising out of the circumstance of one single person carrying on more than one business. In the case of a person carrying on more than one business, all his businesses were to be treated as one business and the benefit of section 7 was to be granted on the basis that all his businesses were one single business. If it be held that a discontinuance of one business by the same person would disentitle him to a deduction in respect of deficiency in it against excess profits earned in another business which continued to be carried on by him, it would clearly go against the principle laid down in the Act. The proviso makes all businesses one business even though the businesses in different chargeable accounting periods may be changed from time to time. As an example, if in a first chargeable accounting period a person happens to be carrying on a business A and in the second chargeable accounting period he does another business B in addition to busi-

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ness *A*, he would still be deemed to be carrying on one business in each of the two chargeable accounting periods. Since his business would be one, any deficiency of profits accruing during the first chargeable accounting period in respect of business *A* could be carried forward by him to the next chargeable accounting period when he was carrying on businesses *A* and *B*. The reverse also applies, viz., any deficiency during the chargeable accounting period when he was carrying on businesses *A* and *B* could be carried back to the chargeable accounting period when he was only carrying on business *A*. This would be on the basis that in each of the two periods he was carrying on only one business. In a third chargeable accounting period he may be carrying on business *B* alone. This would again be one business. It cannot be said that the deficiency in the third chargeable accounting period cannot be carried back to the two earlier chargeable accounting periods, or that the deficiency in the earlier two chargeable accounting periods cannot be carried forward to the third chargeable accounting period. The result is that a deficiency, which occurred in the first period when he was carrying on business *A* alone, would be liable to be adjusted against the excess profits earned when business *B* alone was being carried on by him in the third period, and *vice versa*. If such a result could be obtained by running both businesses *A* and *B* simultaneously during the one intervening chargeable accounting period while there different businesses in the earlier and these periods, there appears to be no reason why the business benefit could not be obtained by discontinuing the business *A* at the end of the first chargeable accounting period and starting business *B* in the third chargeable accounting period. This view expressed by us receive partial support from a decision of the Madras High Court in *P. A. C. Ramaswami Raja v. Commissioner of Excess*

*Profits Tax, Madras* (1) where the assessee had been carrying on two businesses in one period but stopped one of those businesses in the succeeding period. The assessee then claimed under section 7 of the Excess Profits Tax Act to set off the deficiency in the succeeding period against the earlier profits and it was held that neither section 8 (1), nor section 8 (5) applied to the case and the assessee was entitled to the relief in accordance with section 7 on a correct interpretation of the second proviso to clause (5) of section 2 of the Excess Profits Tax Act. It seems to us that this provision of law in principle lays down a rule which is the exact converse of the rule laid down in section 8(1) of the Act. Under section 8 (1) of the Excess Profits Tax Act, if there is a change in the persons carrying on a business, a new business is deemed to have been commenced even if, in fact, the same old business continues to be carried on exactly in the way in which it was being carried on heretofore. This provision thus introduces a fiction of law by which a business continued to be run is deemed to be discontinued and a new business is deemed to be commenced when, in fact, there is no commencement of a new business and only a change occurs in the persons carrying on the business. The effect of the second proviso to clause (5) of section 2 of the Excess Profits Tax Act is that, even though the earlier business is discontinued and a new business is started, the earlier and the later businesses are both deemed to be one business simply because the person carrying on the business happens to be the same. This principle, as we have indicated above, seems to have been laid down in order to give effect to the scheme of the Excess Profits Act under which it was envisaged that one single owner carrying on more than one business during the whole period, in which liability to excess profits tax was imposed by the Act, should have the benefit of adjustment of his deficiency in any of the chargeable accounting

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periods against the excess profits earned in any other chargeable accounting period. It is on this interpretation that we have to hold that the cases relied upon by learned counsel for the Department relating to the applicability of section 10-A of the Excess Profits Tax Act, when there has been a change in persons carrying on the business within the meaning of section 8 (1) of the Excess Profits Tax Act, cannot be applied. Learned counsel relied on the view expressed by the Supreme Court of India in *Sohan Pathak & Sons v. Commissioner of Income-tax, U. P.*, (1) and *Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax* (2), in which cases it was held by the Supreme Court that the effect of section 8 (1) of the Excess Profits Tax Act was that, in case there was a change in persons carrying on a business, that business ceased to exist and the result was that section 10-A could not be applied to that business as the applicability of that section depended on the existence of a business to which the Excess Profits Tax Act applied and which attracted the provisions of the charging section, viz., section 4 of the Act. In the case being us, there may have been a discontinuance of the first business but, later on, another business came into existence and since, by a fiction of law, both had to be treated as one business, it has to be held that that business does exist, so that, under section 5, the provisions of the Excess Profits Tax Act can be applied to it and the excess profits become chargeable to that under section 4 of the Act. Learned counsel for the Department also referred us to a decision in *John Smith & Son v. Moore (H. M. Inspector of Taxes)* (3). That case, in our opinion, cannot be applied as the decision in that case depended on the particular provisions of the Excess Profits Tax Act in force in England during the First World War which Act did not recognize the fact that liability to excess profits tax can be affected by a change in the owner-

(1) 24 I. T. R. 395.

(2) 26 I. T. R. 765.

(3) 12 Tax Cases, 266.



ship of a business. The Excess Profits Tax Act then in force made the liability to tax depend purely on the running of a business irrespective of ownership. The Indian Excess Profits Tax Act, which has to be applied to the case before us, specifically makes a provision recognizing the effect on liability to excess profits tax of change in the persons carrying on a business or continued identity of persons carrying on several business. In these circumstances, we must hold that, in the present case, the business, which was carried on by the assessee during the period from 24th March, 1944, to 28th May, 1945, as well as the business which was carried on earlier during the chargeable accounting period from 8th November, 1942, to 30th September, 1943, were one business, and, consequently, the deficiency in one chargeable accounting period must be adjusted towards the excess profits earned in the other chargeable accounting period under section 7 of the Excess Profits Tax Act. Learned counsel for the Department drew our attention to the fact that the first chargeable accounting period in this case began on 8th November, 1942, and ended on 30th September, 1943, whereas the period, during which the second business ran, does not cover the corresponding period. This is a circumstances which cannot, in our opinion, affect our decision. It will, of course, be for the income-tax authorities to work out the deficiency on the basis of the correct chargeable accounting period which must be applied under the provisions of the Excess Profits Tax Act even to the second business, on the basis that this business and the earlier business were one business and then to make adjustments in accordance with the law.

Let the record be returned to the Income-tax Appellate Tribunal with our opinion expressed above, which answers the question referred to us. The assessee will be entitled to his costs of this case which we fix at Rs.250.

*Question answered.*

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## APPELLATE CIVIL

Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal

KUNWAR JAGDISH CHANDRA (APPELLANT)

v.

1958  
August 13,

BULAQI DAS AND ANOTHER (RESPONDENTS)

**Mesne Profits**—Decree for the recovery of—Construction of—  
Period for which recoverable—Computation of the period  
from and up to which it may be recovered—Code of Civil  
Procedure, 1908, s. 2(12), O. XX, r. 12.

The respondents, claiming under a lease which expired on 31st October, 1941, instituted a suit against the appellant, the lessor, for the recovery of possession of the plot in dispute and for mesne profits. The suit was decreed on 2nd January, 1935, and the decree directed payment of *pendente lite* future mesne profits at a certain rate until delivery of possession. The decree was affirmed in appeal except for an enhancement in the rate of mesne profits. The second appeal was summarily dismissed by the High Court some time in the year 1939. Putting the decree into execution, the respondents claimed mesne profits in terms of the decree.

*Held*, (i) that the decree should, in view of the express provisions of O. XX, r. 12(1) (c), be construed as an award of mesne profits up to a maximum of three years from the date of the decree.

*Uttamam v. Kishoredas* (1) distinguished, *Narayan Govind Manik v. Sono Sadashiv* (2) approved, *Trailokya Nath Ray Chaudhury v. Jogendra Nath Ray* (3) and *Godavarti Raja v. Uttavadi Mattam Sri Ram Chandraswami Varu* (4) referred to.

(ii) that the date of the decree for the purpose of computing the period of three years will be the date when the decree becomes final which, in this case, would be the date of the High Court's order and not that of the trial court's decree.

*Raja Bhupendar Bahadur Singh v. Bijai Bahadur Singh* (5) applied.

(iii) that although three years from the High Court's order would extend up to sometime in 1942, the mesne profits could be recovered only up to 31st October, 1941, the date of the expiry of lease, when the appellant must be deemed to have obtained notional possession or whereafter the appellant's possession became lawful.

(1) (1899) I. L. R. 24 Bom. 149. (2) (1899) I. L. R. 24 Bom. 345.  
(3) (1908) I. L. R. 35 Cal. 1017. (4) A. I. R. 1943 Mad. 354.  
(5) (1900) L. R. 27 I. A. 209.

Special Appeal No. 110 of 1956, from a decision of OAK, J., dated 25th January, 1956, in Execution Second Appeal No. 415 of 1950.

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The facts appear in the judgment.

*Radha Krishna*, for the appellant.

*Brij Lal Gupta*, for the respondents.

The judgment of the Court was delivered by—

DAYAL, J.:—This is a Special Appeal against the judgment of Mr. Justice Oak allowing the execution second appeal by the respondents decree-holders.

Kunwar Jagdish Chandra, appellant, the owner of the plot in dispute leased it to Bulaqi Das and Narain Das respondents for a term of 11 years on 31st October, 1930. The respondents sub-leased the plot and the sub-lessee constructed a building on it. Later on the appellant purchased the materials of that building when sold in execution of a decree and took possession of the plot and the building. In 1933 the respondents instituted the civil suit out of which has arisen this appeal for the recovery of possession and mesne profits against Jagdish Chandra, appellant. On the 2nd January, 1935, the suit was decreed for possession as well as for mesne profits and the decree directed payment of *pendente lite* and future mesne profits at the rate of Rs.30 per mensem until delivery of possession.

Jagdish Chandra filed an appeal against that decree and the decree-holders filed a cross-objection. The appeal was dismissed. The cross-objection was allowed to the extent that the rate of mesne profits was enhanced by Rs.5 per mensem. A second appeal by Jagdish Chandra was dismissed summarily by this Court sometime in 1939.

The decree was then put in execution and Jagdish Chandra filed an objection with regard to the amount payable under the decree. The court ordered that the

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amount for which execution shall be carried out shall be Rs.3,671-8-6 as due up to the 16th November, 1944. He also filed an appeal against the amount determined by execution court, and contended that the mesne profits up to 1944 could not be allowed. The appellate court partly allowed the appeal directing that mesne profits would be recovered under the decree for a period of three years only from the date of the decree of the High Court. Bulaqi Das who was one of the decree-holders filed an execution second appeal on the ground that the appellate court was wrong in holding that mesne profits could be recovered for a period only of three years from the court's decree. Jagdish Chandra filed a cross-objection to the effect that no decree for mesne profits could be passed for the period subsequent to the expiry of the lease in favour of Bulaqi Das appellant and which took place on the 31st of October, 1941. The learned Judge allowed the appeal of Bulaqi Das and dismissed the cross-objection of Jagdish Chandra. Jagdish Chandra has now filed this Special Appeal and prays that it be decreed and that the respondents are entitled to recover mesne profits only for a period of three years from the 2nd January, 1935, the date of the decree of the trial court.

Two points are raised by the appellant. One is that the decree in execution, though saying that mesne profits were payable up to the delivery of possession, is really a decree for the payment of mesne profits in accordance with the provisions of Rule 12, Order 20 of the Code of Civil Procedure and is, therefore, a decree for payment of mesne profits up to three years from the date of the decree as no possession was actually delivered to the decree-holder. The second is that no mesne profits can be recovered after the date which the decree-holder ceased to be lessees and consequently ceased to be entitled to the possession of the land in suit. It is contended for the respondents that the execution court can-

not go behind the decree, that the term of the latter are clear and allow mesne profits up to delivery of possession and that, therefore, the respondents are entitled to recover mesne profits up to the date of the delivery of possession.

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We are of opinion that the contention for the respondents must fail and that the appeal must succeed in part. Order XX, Rule 12, is in these terms:

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"of immovable property and for rent or mesne profits, the court may pass a decree—

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

Clause (c) of sub-rule (i) contemplates a decree directing an inquiry as to mesne profits from the institution of the suit until one of the three events mentioned in sub-clauses (i), (ii) and (iii), whichever of them occurs first. Sub-rule (2) contemplates the passing of a final decree in

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respect of mesne profits in accordance with the result of that inquiry. The final decree contemplated will state the amount of mesne profits which have to be paid by the judgment-debtor to the decree-holder, and, therefore, will have to take into consideration the date up to which mesne profits are to be paid. Such date will be either the date of delivery of possession to the decree-holder, or the date of relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court, or the date of the expiration of three years from the date of the decree, whichever of these alternative dates happen to be the earliest. The decree which has been passed in the present case has to be construed according to law, and has, therefore, in our opinion to be construed to mean that mesne profits are recoverable by the decree-holders up to the date of the delivery of possession, which means, in the context of rule 12, the actual delivery of possession or the notional delivery of possession through relinquishment or through the expiration of three years from the date of the decree. It cannot in our view be interpreted as a decree for the realization of the mesne profits till the actual delivery of possession which, in the present case, may never take place. We cannot think that the court contemplated that the decree-holders by failing to take action to obtain possession could create a right in themselves to recover mesne profits up to an imaginary date for the delivery of possession. Such an interpretation of this decree would mean that the respondents and their successors-in-interest can recover mesne profits from the appellant and his successors-in-interest in perpetuity. The decree is not to be given such a far-reaching interpretation.

It is to be observed that mesne profits really represent the loss which a decree-holder is assumed to suffer on account of the wrongful occupation of the judgment-debtor. If the right of the decree-holder to possession

comes to an end, his right to mesne profits automatically must also come to an end. Mesne profits are defined in clause 12 of section 2 of the Civil Procedure Code thus:

"Mesne profits of property means those profits which the persons in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

The possession of an ordinary judgment-holder will not be wrongful after the lapse of such time which bars the decree-holder to recover possession. Section 28 of the Limitation Act provides:

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

This consideration also makes it incumbent on this Court to put a reasonable interpretation on the decree passed by the trial court and confirmed by the appellate court.

Learned counsel for the appellant has referred to certain cases in support of his contention. No case to the contrary has been cited by learned counsel for the respondents. Reference was made by him to certain cases which lay down that an execution court cannot ordinarily go behind the decree. This is a proposition which is not open to question.

In *Uttaram v. Kishore Das* (1) a decree was passed in 1878 providing for possession of certain land with mesne profits (to be ascertained in execution by the Subordinate Judge) of all of the said land sued for in the plaint

(1) (1899) I. L. R. 24 Bom. 149.

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such mesne profits to be computed from the date of possession being given to the defendants. Nothing was said in the decree as to the date down to which the mesne profits were to be awarded. The decree-holder by his execution application presented in 1881 claimed mesne profits from the date of possession in 1879 up to the date of the delivery of possession. The court awarded mesne profits up to 1881 inclusive. The decree-holder obtained possession actually on the 19th of September, 1882, and applied in 1897 for the ascertaining of mesne profits for the year 1881-82, that is, the period between the date of the application in 1881 and the date of obtaining possession in 1882. This application was rejected by the Subordinate Judge and the appeal therefrom was dismissed by the High Court. It was observed by PARSONS, J., at page 153:

"I do not intend to discuss these difficulties and see whether or not they are unsurmountable, because there is an objection taken here which seems to me to be absolutely fatal to the application. It is that this Court by its decree did not award to the appellant's father the mesne profits now asked for, namely, the profits for the year 1881-82, because it could not award mesne profits for a period longer than three years from the date of the decree under the provisions of section 211 of the Code of Civil Procedure, 1877, which was then in force. In the decree in the present case no period was mentioned, down to which mesne profits were awarded, but we cannot construe it as giving the plaintiffs profits for a period longer than what the law allowed the Court to give. The decree may be supplemented by the law on a point upon which it is silent, but we cannot introduce into it a provision which would be contrary to the law and *ultra vires* on the part of the Court pronouncing it."



RANADE, J., observed at page 155:

"Lastly, there can be no doubt that under section 211 of Act X of 1877, which governed the order under the decree, there was a three years' limit from the date of decree within which mesne profits might accrue, if that event took place earlier than the delivery of possession. As the decree was silent, this provision of the law must be held to have been in the intention of the parties. This three years' limitation also bars the present claim for the profits of 1882."

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This case is distinguishable from the present case where the decree directs payment of mesne profits till the delivery of possession for it is good authority for the proposition that the question of the date up to which mesne profits are to be calculated is a question of construing the decree, and that the court cannot pass a decree for mesne profits which would be contrary to law.

The next is that of *Narayan Govind Manik v. Sono Sadashiv* (1). The case is directly in point. In this case the decree, dated the 19th September, 1884, directed the plaintiff to receive mesne profits from 1st September, 1880, to the delivery of possession, the amount to be fixed in execution of the decree. It was contended that no more than three years, mesne profits could be held to be subject to the limitations laid down in section 211 of the Civil Procedure Code, 1882, which corresponds to Order XX, Rule 12 of the present Code. The District Judge held that he could not go behind the decree. On appeal, it was observed by JENKINS, C. J., at page 349:

"But we may point out that, as held by the Full Bench in *Puran Chand v. Roy Radha Kishen* (2), proceedings for the purpose of ascertaining the amount of mesne profits are a continuance of the original suit, and the court in so ascertaining the

(1) (1899) I. L. R. 24 Bom. 345. (2) (1891) I. L. R. 19 Cal. 132.

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amount is bound by the provisions of section 211. It is true that possession has not yet been delivered to the decree-holders. But this fact does not prevent the clear provisions of the law being followed."

In the result the Court varied the decree of the lower court by limiting the mesne profits to three years subsequent to the 12th of January, 1887, the date of the High Court decree. This case is authority for the view which we are disposed to take, namely, that the present decree must be construed as a decree awarding mesne profits up to three years from the date of the decree.

These cases were followed in *Trailokya Nath Ray Chaudhury v. Jogendra Nath Ray* (1). The facts of this case are similar to those in *Uttamaram's* case (2). The suit was decided on the 20th February, 1890, and the decree directed that the mesne profits due to the plaintiffs be ascertained in execution of the decree. This decree was affirmed by the High Court on the 25th July, 1898. This court below granted mesne profits up to the 16th of June, 1906, the date of the restoration of possession to the decree-holder. It was contended by the judgment-debtor in the High Court that mesne profits could be allowed only for three years from the date of the decree, that is the 25th July, 1898. MACLEAN, C. J., observed at page 1019, with reference to section 211:

"So far as I am aware, this is the only section in the Code, which enables the court to allow mesne profits from the date of the institution of the suit up to the time of the delivery of possession. The language of the section appears to me to be clear. It says 'until the delivery of possession to the party, in whose favour the decree is made, or until the expiration of three years from the date of the decree, whichever event first occurs. "We must give effect to the clear language of the Legislature."

(2) (1899) I.L.R. 24 Bom. 149.

The Court accordingly held that the plaintiffs were entitled to mesne profits for three years from the date of the decree, namely, the 25th July, 1898.

In *Godavarti Raja v. Uttavadi Mattam Sri Ramachandraswami Varu* (1), the decree was one for possession and mesne profits until delivery. It was passed on the 21st February, 1934. Mesne profits were claimed for seven years from 1932. It was observed at page 355—

“Under O. XX, R. 12(1) (c) (iii), Civil Procedure Code, mesne profits can only be decreed for three years after the date of the decree. . . . The same interpretation must be placed on the present decree and we must read it as giving the decree-holder a right to mesne profits till delivery of possession subject to the limit of three years.”

This case also supports our view.

We are of opinion that the decree in the present case should be construed as an award of mesne profits up to three years from the date of the decree in view of Rule 12 (1) (c), Order XX.

The date of the decree for purpose of computing this period of three years will be the date of the final decree, which will be the decree of the High Court. The three years will, therefore, be counted from the date of that decree and not from the date of the decree of the trial court: See *Raja Bhupendar Bahadur Singh v. Bijai Bahadur Singh* (2).

The three years from the date of the decree of the High Court will extend up to some date in 1942. The lease in favour of the respondents, however, came to an end on the 31st of October, 1941. Their rights as lessees, then ceased. They cannot, therefore, be held entitled to mesne profits subsequent to that date. On the determination of the lease the possession of the appellant subsequent to the determination of the lease will be lawful

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(1) A.I.R. 1943 Mad. 354.

(2) 1900 L. R. 27 I.A. 209.

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possession, and, therefore, he cannot be liable for mesne profits subsequent to that date. It must be held that notionally on the 1st of November, 1941, the appellant obtained possession of the land in suit in his right as owner and that his possession thereafter was not as a trespasser liable to account for the use and occupation of the land to the respondents. We are, therefore, of opinion that the mesne profits, which may be claimed by the respondents from the appellant, are mesne profits up to 31st October, 1941, even though this date falls within three years from the date of the final decree in their suit.

In the result we allow this appeal in part and order that Kunwar Jagdish Chandra, the appellant, is liable for mesne profits to the respondents at the rate of Rs.35 per mensem up to the 31st of October, 1941. In the circumstances of this case we are of opinion that the parties should bear their own costs of these appeals. We order accordingly.

*Appeal partly allowed.*

### CRIMINAL REVISION

1958  
 August 18, Before Mr. Justice Mukerji and Mr. Justice Asthana  
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*Criminal Revision—Jurisdiction of High Court—Whether exercisable by a Judge or Judges suo moto—Code of Criminal Procedure, 1898, ss. 435 and 439—Rules of Court, 1952, Ch. V. r. 1.*

Judges of the High Court can exercise the jurisdiction and power of the High Court only when the matter comes before them according to the procedure established by law. A Judge of Allahabad High Court, is, therefore, in view of r. 1 of Ch. V of the Rules of Court, competent to take cognizance only of such cases or matters as are allotted to him by or under directions from the Chief Justice.

A Bench of the High Court, while disposing of a Criminal Appeal, ordered the prosecution of a witness in that case for perjury and forgery. Information about the conviction on being requisitioned and received, the Judges who constituted the aforesaid Bench, passed an order for the issue of a notice on X to show cause why the sentence should not be enhanced. On the case coming up for final hearing:

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*Held*, that the Bench became *functus officio* after passing the necessary order for prosecution of X and could not take further cognizance of the matter unless it was re-constituted and the matter placed before it by an order or direction from the Chief Justice. The issue of notice giving rise to the criminal revision was, therefore, without jurisdiction and the same must accordingly be discharged.

Criminal Revision no. 456 of 1958, in Criminal Appeal no. 601 of 1957 decided by this Court on 6th August, 1957, by a Bench, (JAMES and TAKRU, JJ.).

The Assistant Government Advocate (*H. N. Seth*), for the State.

*S. N. Mulla* and *R. K. Shanglo*, for the opposite party.

MUKERJI, J. —Although I am in entire agreement with the opinion expressed by my learned brother *Asthana*, yet I should like to say a few words of my own since the question that was raised in this case related to the jurisdiction of a Bench of this Court and as such was a matter of importance. It is not necessary for me to go into the facts in any detail since my learned brother's judgment has incorporated in it all the relevant facts necessary for the determination of the question that arose for determination. Suffice it to say that on the 24th March, 1958, a Bench of this Court consisting of Mr. Justice JAMES and Mr. Justice TAKRU directed a notice to issue to the opposite party before us, *Devi Dayal*, to show cause, within three weeks, why the sentences, which had been passed on him by the Magistrate by his order dated the 29th October, 1957, be not enhanced. This notice was directed to issue by the aforementioned Bench ostensibly in the exercise of, as they said, "the High Court's power of Revision".

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On the 6th of August, 1957, JAMES and TAKRU, JJ., while deciding Criminal Appeal no. 601 of 1957, namely, an appeal filed by Krishna Chandra *alias* Bhola and others against the State, held that the opposite party Devi Dayal had been, *prima facie*, guilty of perjury and forgery. They, therefore, directed a notice to issue to Devi Dayal to show cause why he should not be prosecuted and, if found guilty, convicted for the commission of those offences. Devi Dayal showed cause and he, in effect, admitted his guilt and threw himself at the mercy of the Court. The Court was of the opinion that there was no question in the case of the accused throwing himself at the mercy of the Court and thereby escaping the consequences of a legal prosecution. The Bench, therefore, directed the Registrar to file a complaint against Devi Dayal for having committed offences punishable under sections 193 and 465 of the Indian Penal Code. The complaint was duly filed by the Registrar of the Court and it came up for hearing before Mr. S. N. Sharma, Judicial Officer of Khajuha and he by his order dated the 29th of October, 1957, found the opposite party Devi Dayal guilty of offences punishable both under section 193 and section 465, Indian Penal Code. The learned Magistrate, however, awarded very lenient sentences: he awarded a sentence of fine of Rs.100 and simple imprisonment till the rising of the Court under section 193, Indian Penal Code, in default to undergo three months' rigorous imprisonment, and he sentenced Devi Dayal to pay a fine Rs.100 for his conviction under section 465, Indian Penal Code, in default to undergo three months' rigorous imprisonment.

It appears from the judgment, by which the Bench, consisting of JAMES and TAKRU, JJ., issued notice to Devi Dayal to show cause why the sentences, which had been awarded to him by the learned Magistrate, be not

enhanced, that the order of the learned Magistrate was brought to the notice of the Bench by the office of the Court. From an examination of the relevant papers forming part of the record of this case it appears that an endorsement was made on the file by a clerk in the office of this Court in the following words:

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“Reference your Lordships’ order, dated the 26th September, 1957, flagged A, copy of the Judicial Magistrate’s order, flagged B, submitted for favour of perusal.”

This office note was, as the note itself indicates, meant for Hon’ble B. R. JAMES, J., and Hon’ble J. N. TAKRU, J. The office note quoted above appears to have been perused by Hon’ble B. R. JAMES, J., alone, for there is on the office note itself an endorsement by JAMES, J., in the following words:

“Seen. Office to inquire from Sessions Judge, Fatehpur, if any appeal has been filed before him and ask him to send to this Court his judgment as soon as it is delivered.”

This note by JAMES, J., is under date 20th February, 1958. The office sent a letter of enquiry to the learned Sessions Judge of Fatehpur, who by his letter dated the 10th/11th March, 1958, informed this Court that no appeal had been filed by Devi Dayal against the order of the Judicial Magistrate, dated the 29th October, 1957. On receipt of this information from the District Judge of Fatehpur some clerk of the office put up a note to the Assistant Registrar in these words:

“Please see the letter received from the Sessions Judge, Fatehpur, with reference to the Court’s letter no. 2141, dated 1st March, 1958, under the orders of Hon’ble B. R. JAMES, J., dated 20th February, 1958, placed below.

May it be put up before Hon’ble B. R. JAMES, J., for information?”

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It appears that it was on this note by the office that the matter was placed before JAMES, J. It may clearly be mentioned that there was no application on behalf of anybody, nor was there any request otherwise by anybody, to take any further action in respect of the sentences which had been awarded to Devi Dayal by the learned Judicial Officer. The matter appears to have been put up before JAMES, J., in compliance with his directions contained in his note, dated the 20th February, 1958; at any rate, the office understood that note of JAMES, J., to contain a direction to put up the matter before him.

Mr. P. C. Chaturvedi, who appeared in this case *amicus curie* at our request, searched through the cause-lists as also through the files of this case to see whether or not there was any direction of the Chief Justice to lay this matter before JAMES and TAKRU, JJ., for the purpose of seeing whether or not it was a fit case in which a notice for enhancement of sentences should issue. The cause-list of the date on which the order directing notice to issue to Devi Dayal was made, namely, the 24th March, 1958, was also scrutinized by learned counsel and by us and we do not find this case shown in the cause-list as a case for hearing before JAMES and TAKRU, JJ. So that, on the facts, it is perfectly clear to me that this case was not placed before these learned Judges by either the Chief Justice or in accordance with any directions given by him. The case appears to have been taken cognizance of by them *suo motu*, so to speak. The question that arises and has been raised is whether under the aforementioned circumstances the order which the Bench made directing issue of notice to Devi Dayal to show cause why his sentences should not be enhanced was within the jurisdiction of that Bench.

Notice for enhancement could be issued by this Court under its Revisional jurisdiction. Revisional



jurisdiction is conferred on this Court by section 435 of the Code of Criminal Procedure. The jurisdiction that this section confers is on the 'High Court' and not on any individual Judge of the Court or on any Bench of the Court. The powers which the High Court can exercise while exercising its Revisional jurisdiction are provided for in section 439 of the Code of Criminal Procedure and here too, it may be noticed, the powers that are described there are the powers of the 'High Court' and not of any individual Judge or any individual or particular Bench of the High Court. If there was nothing else in the law, then whenever any Revisional power had to be exercised by the High Court, that power could only be exercised by the entire Court and not by any Single Judge or a Division Bench of the Court.

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As my learned brother has pointed out, the jurisdiction of the High Court and its powers are provided for by Article 225 of the Constitution. That Article provides that—

"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution .....

....."

In order to discover what exactly were the powers immediately before the commencement of the Constitu-

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tion, one has to turn first to section 223 of the Government of India Act of 1935. That section was in these words:

"Subject to the provisions of this part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of and the law administered in, any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of Part III of this Act."

This necessitates our looking into the Government of India Act of 1915. Section 108 of that Act was in these words:

"108. (1) Each High Court may, by its own rules, provide as it thinks fit for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges, of the High Court, of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of each High Court shall determine what Judge in *each case* is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute several Division Courts."

This Court has framed the following rule appropriate to what was provided for by section 108 of the Govern-

ment of India Act, 1915, namely, Rule 1 of Chapter V of the Rules of the Court, which is in these words:

“Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions.”

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It is clear to me, on a careful consideration of the constitutional position, that it is only the Chief Justice who has the right and the power to decide which Judge is to sit alone and what cases such Judge can decide; further, it is again for the Chief Justice to determine which Judges shall constitute Division Benches and what work those Benches shall do. Under the rules of this Court, the rule that I have quoted above, it is for the Chief Justice to allot work to Judges and Judges can do only such work as is allotted to them. It is not, in my view, open to a Judge to make an order, which could be called an appropriate order, unless and until the case in which he makes the order has been placed before him for orders either by the Chief Justice or in accordance with his directions. Any order, which a Bench or a Single Judge may choose to make in a case that is not placed before them or him by the Chief Justice or in accordance with his directions, is an order which, in my opinion, if made, is without jurisdiction. As has been pointed out by my learned brother and as I myself have briefly pointed out above, the case in which the Bench purported to make an order—the order directing a notice to issue to Devi Dayal to show cause why his sentences should not be enhanced—was not a case that had been directed to be placed before JAMES and TAKRU, JJ., for orders. That being so, I agree with my learned brother that the order which has been made and in consequence of which the present criminal revision has been listed before us for disposal was without jurisdiction. If the order issuing the

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notice was without jurisdiction, as both my learned brother and I have held it was, then the notice for enhancement, in my view, must be discharged and the revision dismissed.

I, therefore, agree with my learned brother in the order that he has proposed, namely, that this revision should fail and the notice for enhancement issued against Devi Dayal discharged.

ASTHANA, J.:—This revision arises out of circumstances which may be shortly stated as follows:

Bawra, Sheo Balak and Krishna Chandra *alias* Bhola were prosecuted for the murder of one Manni Lal. Debi Dayal was one of the defence witnesses in order to prove the *alibi* of Krishna Chandra *alias* Bhola. Besides his oral evidence, he also produced a document in support of the *alibi*. The learned Sessions Judge did not accept his evidence and convicted all the three accused on the charge of murder. They filed an appeal against their conviction and sentences in this Court and a Bench of this Court consisting of JAMES and TAKRU, JJ., dismissed the appeal and maintained the convictions and the sentences of death passed against Krishna Chandra and Bawra and set aside the sentence of death of Sheo Balak and in lieu of it sentenced him to imprisonment for life. It was further ordered by the Bench that a notice should be issued to Debi Dayal to show cause why a complaint should not be filed against him under section 465, Indian Penal Code, for falsely deposing that the accused Krishna Chandra was at Chitrakot in district Banda at the time of the said murder.

Debi Dayal appeared before that Bench in response to the notice issued to him. It was contended on his behalf that there was nothing on the record to show that the evidence given by him at the trial was false or

that the document Ex. D-1 was a forgery. In the alternative, it was pleaded that Debi Dayal was repentant of his act and would not repeat it in future. It was observed by the Bench that it was not a case of a contempt of court where the contemner could purge himself by admitting his guilt and throwing himself on the mercy of the Court, but that it was a proceeding under section 476, Criminal Procedure Code, where the basic consideration was whether or not it was expedient in the interest of justice to make a complaint. It was further observed by their Lordships that if Debi Dayal was genuinely sorry and confessed his guilt and threw himself on the mercy of the Court due consideration would be paid to his attitude. It was decided to file a complaint against Debi Dayal under section 465 for filing the report Ex. D-1 and under section 193, Indian Penal Code, for falsely swearing to Krishna Chandra's *alibi* in the murder case before the Sessions Judge of Fatehpur and accordingly the Registrar of the Court was directed to file the complaint.

The learned Magistrate, Sri S. N. Sharma, before whom the complaint was filed and who decided the case, was of the opinion that both the charges under sections 193 and 465, Indian Penal Code, had been made out against the opposite party Debi Dayal. It may be mentioned here that when the case was taken up by the learned Magistrate, Debi Dayal admitted his guilt and threw himself at the mercy of the court. In view of the confession made by Debi Dayal and also in view of the fact that he had thrown himself at the mercy of the court, the learned Magistrate seems to have taken a lenient view of the matter, probably because of the observations made by the Bench which directed the prosecution of Debi Dayal.

It appears that in the letter, dated 9th October, 1957, which was sent along with the complaint to the District Magistrate, Fatehpur, it was directed that the result of

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the complaint might be communicated to this Court. I have, however, not been able to find anything in the order of the 26th September, 1957, passed by the said Bench directing the filing of the complaint, that the result of the complaint should be communicated to it. On the 18th February, 1958, a copy of the judgment of the Judicial Magistrate was placed before the said Bench and it was mentioned therein that it was being submitted before their Lordships in pursuance of their order, dated 26th September, 1957. It has already been said above that there is nothing in the order of the 26th September, 1957, that a copy of the judgment of the Judicial Magistrate should be submitted before it. On a perusal of the judgment of the Judicial Magistrate, JAMES, J., passed the following order on the 20th February, 1958:

"Seen. Office to enquire from the Sessions Judge, Fatehpur, if any appeal has been filed before him and ask him to send to this Court the judgment as soon as it is delivered."

On the 10th March, 1958, the learned Sessions Judge, Fatehpur, informed this Court that no appeal had been filed in his court by the accused Debi Dayal against the order of the Judicial Magistrate, Khajuha, dated 29th October, 1957, in the case no. 227 of 1957, *State v. Debi Dayal*, under section 193, Indian Penal Code, Police Station Kotwali, Fatehpur. This letter was put up before JAMES and TAKRU, JJ., and on the 24th March, 1958, their Lordships issued a notice to Debi Dayal to show cause within three weeks as to why the sentences passed on him by the Magistrate be not substantially enhanced, and the present criminal revision has arisen out of this notice.

The question of law which is involved in the present case is whether the Bench constituted of JAMES and TAKRU, JJ., had the jurisdiction to issue notice to the

opposite-party to show cause against the enhancement of the sentences passed against him by the Judicial Magistrate. This notice appears to have been issued under the revisional powers of the High Court embodied in sections 435 and 439 of the Code of Criminal Procedure. It will appear from a perusal of these sections that the power was conferred on the High Court and not on any individual Judge or Bench of Judges constituting the High Court. There must be some provisions either in the Constitution or in the rules framed by the High Court under the powers given to it to confer jurisdiction on individual Judges or Bench of Judges in respect of matters within the cognizance of the High Court before such individual Judges or Benches can exercise jurisdiction in these matters.

As it was question of some legal importance, we asked *Mr. P. C. Chaturvedi* to assist us in this matter and he has very kindly studied the point and placed the entire law before us. We are very much indebted to him for the help which he gave us in this matter.

I have stated the entire facts which led to the issue of the notice by the aforesaid Bench. I will now proceed to consider the law on the question as has been placed before us by Mr. Chaturvedi. Article 225 of the Constitution of India defines the jurisdiction of the existing High Courts and runs as follows:

"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in this court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in

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division courts, shall be same as immediately before the commencement of this Constitution:

"Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution, shall no longer apply to the exercise of such jurisdiction."

The law on this subject immediately before the commencement of this Constitution is embodied in Article 223 of the Government of India Act, 1935. This Article is as follows:

"Subject to the provisions of this part of this Act, to the provisions of any order in council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction and the law administered in, any existing High Court and the respective powers of the judges thereof in relation to the administration of justice in this court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be same as immediately before the commencement or Part III of this Act."

It, therefore, became necessary to find out as to what was the law on the subject immediately before the commencement of Part III of this Act. The law which was enforced before Article 223 was enacted was contained in Article 108 of the Government of India Act, 1915. This Article provides as follows:

"108. (1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one



or more judges, or by division courts constituted of two or more judges of the High Court, of the original and appellate jurisdiction vested in the court.

(2) The Chief Justice of each High Court shall determine what judge in each case is to sit alone and what judges of the court whether with or without the Chief Justice are to constitute the several division courts."

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Rule 1, Chapter V, of the Rules of this Court, provides that Judges shall sit alone or in such division courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions.

It will appear from a perusal of the above provisions that the High Court as a whole consisting of the Chief Justice and his companion Judges has got the jurisdiction to entertain any case either on the original or on the appellate or on the revisional side for decision and that the other Judges can hear only those matters which have been allotted to them by the Chief Justice or under his directions. It, therefore, follows that the Judges do not have any general jurisdiction over all the cases which the High Court as a whole is competent to hear and that their jurisdiction is limited only to such cases as are allotted to them by the Chief Justice or under his directions. In this view of the matter I do not think that the Bench consisting of JAMES and TAKRU, JJ., which decided the appeal no. 601 of 1937, *Krishna Chandra and others v. State*, and during the hearing of which appeal it directed the issue of notice to Debi Dayal who was one of the witnesses in that case to show cause against his prosecution under sections 465 and 193, Indian Penal Code, had any further jurisdiction after the conviction of Debi Dayal by the learned Magistrate to issue notice to him to show cause as to why his sentences under sections 193 and 465, Indian

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Penal Code should not be enhanced. I am of opinion that after the said Bench had decided the appeal and had directed the filing of the complaint against Debi Dayal, it became *functus officio* and had no further jurisdiction left in the matter. It could have jurisdiction in the matter only if the case were listed before it under the orders of the Chief Justice or in accordance with his directions. I have not been able to find anything from the record that the Chief Justice had passed any such order that the matter relating to the sentences of Debi Dayal under the different sections should be listed before the said Bench, or that it had been listed for necessary orders before the said Bench. In this view of the matter I am of opinion that the Bench consisting of JAMES and TAKRU, JJ., had no jurisdiction to issue notice to Debi Dayal to show cause for the enhancement of the sentences passed against him under sections 465 and 193, Indian Penal Code, by the Judicial Magistrate.

I am, therefore, of opinion that this revision should be dismissed and the notice issued to Debi Dayal should be discharged. I order accordingly.

*By the Court—*

For the reasons given in our respective judgments of date, we dismiss this revision and discharge the notice, which was issued to opposite party Debi Dayal to show cause why his sentences should not be enhanced.

*Revision dismissed.*

### CRIMINAL REFERENCE

*Before Mr. Justice Chaturvedi and Mr. Justice James*  
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Nov. 18,

Iron and Steel (Control of Production and Distribution) Order, 1941, s. 11-B (3)—Not ultra vires—Report not analogous to charge—Not to contain that minute details. Section 11-B (3) of the Iron and Steel (Control of Production and Distribution) Order, 1941, is not *ultra vires*.

A report under s. 11 of the Order is to contain only the "facts constituting the offence" and is not to take the place of the "charge" and should not contain every minute detail which is to be subsequently mentioned in the charge to be framed against the accused.

Case-law discussed.

Criminal Reference No. 452 of 1956, made by T. C. Kapur, Sessions Judge, Sultanpur.

J. N. Agarwala, for the applicants.

[The case was at first heard by SRIVASTAVA, J., who referred it to a Division Bench for decision of an important point].

The facts appear in the following referring order—

SRIVASTAVA, J.:—This is a reference made by the learned Sessions Judge of Sultanpur.

On a report, dated the 20th August, 1955, submitted by the Station Officer, Kotwali, Sultanpur, a charge has been framed against Bhagwati Saran and Srimati Sushila Devi under section 7 of the Essential Supplies (Temporary Powers) Act, 1946, read with section 11-B (3) of the Iron and Steel (Control of Production and Distribution) Order, 1941. The allegation is that they sold iron and steel goods at a price higher than the controlled price.

The accused went up in revision against the order framing the charge to the Sessions Judge and raised two points. The first point was that the learned Magistrate could not have taken cognizance of the offence alleged as the report on the basis of which cognizance was taken did not contain sufficient materials as required by section 11 of the Essential Supplies Act. The second point was that no maximum price having been fixed, there was no question of the accused having sold iron and steel at a price higher than the controlled price.

The first contention found favour with the learned Sessions Judge but the second did not. In respect of the second, he found that the maximum price had been fixed by a notification published in the *Gazette of India*. On the basis of the first contention, however,

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he has recommended that the charge framed against the applicants be quashed and that they be discharged.

When this reference was argued before me, the learned counsel, who appeared in support of it, reiterated the first contention which found favour with the Sessions Judge. He did not urge the second contention, but instead urged another contention. That was that section 11-B (3) of the Iron and Steel (Control of Production and Distribution) Order, 1941, was *ultra vires* and even if the accused are held to have sold the iron and steel at a price higher than that notified under that provision, they cannot be held to have committed any offence. In support of this new contention, the learned counsel placed reliance on a Full Bench case of the High Court of Madhya Pradesh: *State v. Haidarali* (1).

Now so far as the first contention is concerned, it is true that the report which the Station Officer submitted did not contain the full particulars as it ought to have contained, but on account of that defect, I think it cannot be maintained that the cognizance taken by the learned Magistrate on the basis of that report was illegal or that the proceedings started against the accused stand vitiated. In this connection we have to bear in mind the observations made by their Lordships of the Supreme Court in the case of *H. N. Rishbud v. State of Delhi* (2). There it was laid down in connection with section 190, Criminal Procedure Code, which is in almost identical terms with section 11 of the Essential Supplies (Temporary Powers) Act, 1946:

"No doubt a police report which results from an investigation is provided in section 190, Criminal Procedure Code, as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Criminal Procedure Code, is one out

(1) A.I.R. 1957 M.P. 179.

(2) A.I.R. 1955 S.C. 196.

of a group of sections under the heading 'Conditions requisite for initiation of proceedings.' The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., sections 193 and 195 to 199.

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These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is, therefore, a nullity."

In view of the observations, I think it is not possible to accept the contention of the accused that because the police report submitted in this case was not as detailed as it could have been, the cognizance taken by the learned Magistrate was a nullity and the proceedings must be quashed on that account. The first contention which appealed to the Sessions Judge thus becomes unacceptable.

The second contention, however, raises an important point of general importance on which there does not appear to be any decision of this Court. The point is important enough, in my opinion, for being decided by a Division Bench. I, therefore, direct that the case be placed before the Hon'ble the Chief Justice for constituting a larger Bench for the consideration of the question whether section 11-B (3) of the Iron and Steel (Control of Production and Distribution) Order, 1941, is *ultra vires*.

The case was then laid before the Bench.

The judgment of the Court was delivered by—

CHATURVEDI, J.:—A learned Single Judge of this Court has referred the following question for decision by a Bench—

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"Whether section 11-B (3) of the Iron and Steel (Control of Production and Distribution) Order, 1941, is *ultra vires*."

The above question arises under the following circumstances. The applicant no. 2, Srimati Sushila Devi, is said to be the proprietor of the firm Balwanta Devi Sushila Devi situate in Sultanpur and the applicant no. 1 Bhagwati Saran, who is the husband of Sushila Devi, is said to be the Manager of the firm. On the 11th of January, 18th of February and 26th of February, 1952, the firm sold iron bars to certain purchasers. The case of the prosecution is that the applicants charged a price higher than the controlled price. The case was accordingly sent to the court of the Magistrate and the Magistrate framed charges with respect to the above sales charging the applicants that they "committed an offence punishable under section 7, Essential Supplies (Temporary Powers) Act, 1946, with section 11-B (iii) of the Iron and Steel (Control of Production and Distribution) Order, 1941, . . .". The applicants filed a revision before the Sessions Judge praying that this charge be quashed. There were two points urged before him, one of which the learned Sessions Judge rejected and on the other he made a reference to this Court for quashing the charge. This other point was that the report sent by the police to the court in respect of the charge was not a full and detailed report containing all the necessary facts and on such a report, no charge against the applicants should have been framed.

The learned Single Judge before whom the revision came up for hearing did not agree with the Sessions Judge on the point on which the reference was made by him and expressed the opinion that even though the police report did not contain all the facts in detail, the Magistrate was still competent to take cognizance

of the offence. Before the learned Judge, however, another point was urged by the learned counsel for the applicants and it was to the effect that clause 11-B of the Iron and Steel (Control of Production and Distribution) Order of 1941 gave an unrestricted and uncontrolled power to the Iron and Steel Controller to fix any price he liked for the sale of the goods mentioned in the Control Order and the placing of such a power in the hands of an executive officer amounted to an unreasonable restriction on the fundamental right of the applicants to carry on their trade. The learned Single Judge was of the opinion that the point raised by the learned counsel was an important one and there being no decision of this Court on this point, it should be decided by a Division Bench.

The learned counsel for the applicants has urged the same point before us, which he took before the learned Single Judge, and his contention is that the restriction being an unreasonable one, clause 11-B (iii) of the Iron and Steel (Control of Production and Distribution) Order of 1941, (hereinafter called the control order), is inconsistent with Article 19(1) (g) of the Constitution. In support of his contention the learned counsel referred to the case of *State v. Haidarali* (1). A Full Bench of the Madhya Pradesh High Court considered the question in some detail, (if we may say with respect), and in the end came to the conclusion that clause 11-B of the Control Order "is *ultra vires* as it amount to an unreasonable restriction upon the fundamental rights guaranteed by the Constitution in Article 19(1) (f) (g)." The learned counsel for the applicants before us has not urged that clause 11-B was inconsistent with Article 19(1) (f) of the Constitution but has only urged that it is inconsistent with Article 19(1) (g).

The Control Order was originally passed under the Defence of India Rules. On these rules ceasing to have

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(1) A. I. R. 1957 M. P. 179.

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force, the order was adopted under the Essential Supplies (Temporary Powers) Act of 1946. The life of this Act was extended from time to time till it was substituted by the Essential Commodities Act, (Act X of 1955), which received the assent of the President on 1st April, 1955. Both parties agree that the order is still in force. The sole contention of the learned counsel for the applicants is that in the control order itself no formula for fixation of the price of the goods covered by the order has been laid down, and absolute authority has been given to the Iron Controller to fix any price that he likes of the said articles. It is said that the Iron and Steel Controller may fix a price lower than the cost price and it may not be possible for the dealers to sell the articles at that price. In such a case the entire business of the dealers would be paralysed and they would not be able to carry on the trade, concerning which a fundamental right has been conferred upon them under Article 19(1) (g) of the Constitution. In order to appreciate the point we may refer to certain provisions of the Essential Commodities Act of 1955. Sub-section (1) of section 3 is in all material particulars the same as sub-section (1) of section 3 of the Essential Supplies (Temporary Powers) Act, 1946. It is as follows—

“(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.”

Sub-section (2) of the section says that without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide for



the matters enumerated in the sub-section. Only clause (c) of the sub-section is important and it is to the effect that the order may provide for controlling price at which any essential commodity may be bought or sold.

Section 5 of the Essential Commodities Act is also for all practical purposes the same as section 4 of the Essential Supplies Act. It is as follows—

“The Central Government may, by notified order, direct that the power to make orders under section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by—

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government,

as may be specified in the direction.”

A reading of the above provisions of law would show that an authority has been conferred on the Central Government, on condition of its being of opinion that it is necessary or expedient in order to maintain or increase supplies of any essential commodity or securing its equitable distribution and availability on fair prices, to make an order providing for regulating or distributing the production, supply and distribution of the commodity and trade and commerce therein. For the above purposes it may also control the price at which any essential commodity may be bought or sold. Section 4 of the Essential Commodities Act further authorises the Central Legislature to confer powers and duties upon the Central Government, the State Government of the officers of the Governments, and it may also issue

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directions to the said authorities concerning the exercise of such power. The Central Government in its turn has been authorised by section 5 to direct that the power to make orders mentioned in section 3 shall in relation of such matters and subject to such conditions, if any, be exercisable also by the State Government or any officer or authority subordinate to the Central Government or the State Government.

The legality of the delegation of powers contained in sections 3 and 4 of the Essential Supplies Act and also section 6 of that Act was challenged in the case of *Hari Shanker Bagla v. State of Madhya Pradesh* (1). The Nagpur High Court had held section 6 of the Essential Supplies Act to be an invalid piece of legislation but had upheld the constitutionality of sections 3 and 4 of the Act. Their Lordships of the Supreme Court, however, declared that all the three sections were constitutionally valid. On account of the above decision the learned counsel for the appellants did not challenge the constitutionality of any of the provisions of Essential Commodities Act of 1955. His sole grievance is that the price schedule has not been framed by the Central Government in the impugned control order but the Central Government left that matter to be settled by the Iron and Steel Controller of India. The learned counsel has also not alleged that the prices fixed by the Iron and Steel Controller in his notification, dated the 1st of July, 1952, are in any way unreasonable or did not provide for the availability of the commodities at fair prices. His contention is that an officer subordinate to the Central Government has been authorized by the Central Government to fix any price that he liked and the conferment of these uncontrolled and unguided powers might possibly had the effect of prices being fixed at unreasonable rates and that pos-

(1) A.I.R. 1954 S.C. 465.

sibility by itself is sufficient for holding that the notification issued by the Iron and Steel Controller of India fixing the prices of these articles to be invalid, as also clause 11-B (iii) of the said control order. Clause 11-B (i) of the Control Order authorizes the Controller to fix from time to time, by notification in the *Gazette of India*, the maximum price at which any iron or steel may be sold by the producer, the stockholder and any other class of persons. He has been authorized to fix different prices for iron and steel obtainable from different sources and may include allowances for contribution to and payment from any equalization fund established by the Controller for equalizing freight, the concession rates payable to each producer or class of producer for any other disadvantages. Sub-clause (iii) of clause B prohibits a producer or stockholder and all other persons from selling or offering to sale or from acquiring any iron or steel at a price exceeding the maximum price fixed under clause 11-B.

We have carefully considered the decision of the Full Bench of the Madhya Pradesh High Court in the case of *State v. Haiderali* (1), but there is one aspect of the question which does not appear to have been put before the learned Judges of Nagpur High Court.

That aspect is that the delegation of power contained in sections 3 and 4 of the Essential Supplies Act having been held to be valid by their Lordships of the Supreme Court, the exercise of that power by any one of the delegates or sub-delegates has to be taken to have been exercised by a proper authority; and unless the power has been exercised in such a manner as to make the order passed by the authority unreasonable, the order, we think, cannot be held to be invalid on the ground that it might possibly have been a different order and

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might possibly have been unreasonable so as to impose an improper fetter on the exercise of the trade by the dealers in iron. A reading of the judgment of the Full Bench mentioned above shows that they might have upheld the order passed by the Iron and Steel Controller fixing the prices, if these fixations were to be found in the Control Order itself. What they have mainly objected is the conferment, by clause 11-B of the Control Order, of power on controller without laying down any principles for the guidance of the Controller or without the Control Order itself having specified the principles on which the prices were to be fixed.

After considerable hesitation, we have arrived at the conclusion that the conferment of powers by sections 3 and 4 of the Essential Supplies Act having been held to be valid, any of the persons mentioned in those sections could exercise the power and it made no difference whether part of the power was exercised by the delegate mentioned in section 3 and the other part by the sub-delegate mentioned in section 4 of the Essential Supplies Act or the corresponding provisions in the Essential Commodities Act.

In the case of *Dwarka Prasad Lakshmi Narain v. State of U. P.* (1), their Lordships of the Privy Council were called upon to consider the constitutionality of the U. P. Coal Control Order of 1953. This Control Order conferred powers on the licensing authority to grant, refuse to grant, renew or refuse to renew, a licence and also to suspend, cancel, revoke or modify any such licence or any terms of the licence. Clause 7 of this order authorised the State Controller by written order to require any person holding stock of coal to sell the whole or part of it to such persons or class of persons and on such terms and prices as might be determined in accordance with the provisions of the Order. The Control Order itself laid down a formula for the fixation

(1) A. I. R. 1954 S. C. 224.

of prices of different kinds of coal. The learned Judges held that the licensing authority had been given absolute power to grant or to refuse to grant or to renew or revoke or cancel the licence. It was remarked that this power could be exercised by every person whom the State Controller thought fit. The provision was therefore, held to be an unreasonable one, because no rules had been framed and no directions given as to the exercise of the powers by the licensing officer. Consequently, clause (4) (iii) of the Order was held to be unconstitutional. But their Lordships also considered the validity of clauses 7 and 8 of the Control Order. Clause 7 authorized the State Coal Controller to fix a price at which alone coal could be sold or purchased. Clause 8 also related to the maximum price at which coal could be sold. The learned Judges upheld the validity of these clauses, after entering into the question whether the formula given in the Control Order laid down reasonable terms or not. They were of opinion that the terms of the formula were not unreasonable and they upheld the validity of clauses 7 and 8. The important fact to notice is that the Control Order was issued by the State Government of Uttar Pradesh and it must have been authorized to issue the Order by the Central Government. The power was thus exercised by a sub-delegate under section 4 of the Essential Supplies Act and their Lordships considered it necessary to go into the reasonableness of the formula of the fixation of prices laid down by the sub-delegate. In the case of the Control Order impugned before us, the prices were fixed by a sub-delegate under section 4 of the Essential Supplies Act. The Central Government, instead of itself fixing the prices, has authorized the Iron and Steel Controller to fix them, without laying down any detailed principles or directions. This it could do under section 4 (a) of the Essential Supplies Act. The power thus having

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been exercised by a person authorized by the Statute itself, it could not be held to be invalid unless it was found that it had been unreasonably exercised. The same appears to be the position in the case of *State of Rajasthan v. Nathmal* (1). In this case the validity of a number of provisions of Rajasthan Food Grain Control Order of 1949 was challenged. Their Lordships upheld the provision conferring authority on the officers mentioned in clause 25 to freeze stock of foodgrains, but that clause contained a further power that these stocks could be requisitioned or disposed of under orders of the said officers at the prices fixed for the purpose of Government procurement. After holding that the power given to the officers of freezing stock of foodgrains was a reasonable restriction on the right of the respondent, they proceeded to consider whether the provision for requisition or disposal of the foodgrains at the prices fixed by the officer was valid or not. They held that this power was an unrestricted and unreasonable one and then their Lordships did proceed to consider whether the prices fixed for procurement at Government rates were reasonable or not and they came to the conclusion that they were unreasonable. The market price at the time was Rs.17 or Rs.18 per maund but the Government could requisition at Rs.9 per maund. This portion of clause 25 was, therefore, held to be invalid but the provisions of clauses 23 and 24 were held to be in contrast with the last provision of clause 25. Clause 23 authorized the Commissioner and other officers to fix the ceiling price at which foodgrain in any area, to which the order applied, could be sold; and from time to time the prices so fixed could be altered. Clause 24 authorized the officers concerned to issue any direction to any person to sell foodgrains or part thereof to any person or persons at such price as

(1) A. I. R. 1954 S. C. 307.

might be fixed under clause 23. A reading of clause 23 does not show that any guiding principles for the fixation of price were given in the clause. It is true that the officers enumerated in the clause could fix the price with the approval of the Director, but that makes out no difference in principle.

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In the case of *Hari Shanker Bagla* (1) their Lordships have remarked that section 3 of the Essential Supplies Act does contain some guiding principles, namely, the maintenance or the increasing of supply of essential commodities or securing their equitable distribution and availability at fair prices. The relevant principle laid down by the legislature thus is that the commodities which are covered by the Essential Supplies Act or the Essential Commodities Act should be available at fair prices. The authorities enumerated in sections 3 and 4 were delegated power to fix the prices of the said commodities, among other matters. The prices that have been fixed under the Control Order impugned before us have been fixed by an authority mentioned in section 4 of the Essential Supplies (Temporary Powers) Act, 1946. The said authority has, under valid statutory power, fixed the prices and unless the prices are unreasonable in any manner, we do not think that the notification of the Iron and Steel Controller of India can be struck down on the ground that no principles for the fixation of the prices were mentioned in the Control Order itself. As already stated, the Control Order was issued by the delegate mentioned in section 3 of the Essential Supplies Act and that delegate left it to its sub-delegate to fix the prices. The delegate may not have laid down any guiding principles but the sub-delegate also had valid statutory authority to lay down the principles at which prices were to be fixed. We do not think that the fixation of the prices should be held to be invalid merely on the ground that the delegate men-

(1) A. I. R. 12 A D S. C. 465.

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tioned in section 3 had not laid down any principles of the fixation of prices itself but left the matter to its sub-delegate. The question of fixing prices involves a consideration of numerous factors and circumstances and the prices also have to be altered from time to time. It is difficult to lay down any principles for any substantial period of time and the matter was thus left to a senior officer of the Central Government, to whom the powers in that behalf could be delegated under section 4 of the Essential Supplies Act.

For the above reasons, we think no portion of clause 11-B of Iron and Steel (Control of Production and Distribution) Order, 1941, is unconstitutional.

The question referred to us and mentioned in the beginning of our judgment is thus answered in the negative.

[On the case finally coming up for hearing before SRIVASTAVA, J. the following judgment was delivered.]

This is a reference made by learned Sessions Judge of Sultanpur.

The facts giving rise to it have been mentioned in my order, dated the 3rd of June, 1958, and need not be repeated.

Two contentions were pressed on behalf of the applicants in support of the reference. The first was that as the report submitted under section 11 of the Essential Supplies (Temporary Powers) Act, 1946, did not contain sufficient details, cognizance could not have been taken on its basis. The other contention was that section 11-B (3) of the Indian Iron and Steel (Control of Production and Distribution) Order, 1941, was *ultra vires*. The first contention was rejected. The other contention was considered to be important enough to merit consideration by a Division Bench. The case was, there-



fore, directed to be placed before the Hon'ble the Chief Justice for constituting a larger Bench for the consideration of the question. A Bench consisting of Mr. Justice CHATURVEDI and Mr. Justice JAMES has since considered the question and has held that section 11-B (3) of the Indian Iron and Steel (Control of Production and Distribution) Order, 1941, is not *ultra vires*. The point thus now stands concluded against the applicants.

Learned counsel for the applicants did not feel satisfied with the view that had been taken in the order, dated the 3rd of June, 1958, in respect of his first contention and urged that section 11 of the Essential Supplies Act was analogous more to section 193 of the Criminal Procedure Code than to section 190 and that on that account if the report submitted under section 11 was not a complete and detailed report, cognizance could not be taken on its basis. He relied in support of this contention on *Dr. N. G. Chatterji v. Emperor* (1), *Roshan Lal v. Rex* (2), *Rachpal Singh v. Rex* (3), and *State of Assam v. Deo Kishan Mohta* (4).

Section 11 of the Essential Supplies Act, (Act XXIV of 1946), provides:

"No court shall take cognizance of any offence punishable under this Act, except on the report in writing of the facts constituting such offence made by the person who is a public servant as defined in section 21 of the Indian Penal Code."

All that is, therefore, required for compliance with this provision is (1) that there should be a report in writing, (2) that it should be made by a public servant as defined in section 21 of the Indian Penal Code and (3) that it should contain facts constituting the offence.

A report in the present case was admittedly submitted by the Station Officer, Kotwali, Sultanpur, who was a

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(1) (1946) 47 Cr. L.J. 876.

(2) 1949 A.L.J. 541.

(3) (1949) 50 Cr. L. J. 469.

(4) A.I.R. 1955 N.U.C. 4246.

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public servant, as defined in section 21 of the Indian Penal Code. The report was in writing. It was stated therein that the firm Balwanta Devi, Sushila Devi was owned by Srimati Sushila Devi and that her husband Bhagwati Saran was its Manager. It was also alleged in it that iron goods had been sold by Bhagwati Saran over and above the controlled rates a number of times and that accounts and receipts had been fabricated with a view to escape detection by the authorities. It was also stated definitely that the accused had in that manner contravened the provisions of the Indian Iron and Steel (Control of Production and Distribution) Order, 1941.

After cognizance had been taken, a charge was framed against the applicant in the following terms:

"That you between 10th January, 1952, and 27th February, 1952, in Sultanpur sold 11 cwt. 12 lbs. iron bars on 11th January, 1952, 3 cwt. iron bars on 18th February, 1952, and 6 cwt. iron bars on 26th February, 1952, at the rate of Rs.21-13-9 per cwt. though the controlled rate as notified in *Government of India Gazette*, dated 1st July, 1952, for the commodity was Rs.21-2-4 per cwt. and thus you charged Rs.1-15, Rs.2-2-3 and Rs.4-4-6 respectively excess and more than the controlled price and thereby committed an offence punishable under section 7 of the Essential Supplies (Temporary Powers) Act, 1946, read with section 11-B (iii) of Iron and Steel Control of Production and Distribution Order of 1941 and I hereby direct that you be tried by the said court on the said charge."

The argument of the learned counsel for the applicants is that because the details of the offence, viz., the date, time or the name to whom the iron was sold, had not been mentioned in the report submitted under section 11 of the Essential Supplies Act, it was not open to

the learned Magistrate to take cognizance of the case.

The report which was to be submitted under section 11 of the Act could not, however, be expected to take the place of the charge which was to be ultimately framed against the accused after cognizance had been taken.

The only thing which was required by law to be entered in the report was "facts constituting the offence." In the present case the offence consisted of the fact that iron had been sold by the accused at rates exceeding the controlled rates. That was clearly mentioned in the report. The provision of law which had been contravened had also been specifically mentioned. It cannot, therefore, be said that the report was deficient inasmuch as the facts constituting the offence were not mentioned in it. Before the trial commenced all the necessary details were mentioned in the charge and the applicants thus knew very well what case they were required to meet. They cannot, therefore, contend that they have been prejudiced in any manner.

The cases relied upon do not appear to be of much help to the applicants. Thus in the case of *Dr. N. G. Chatterji v. Emperor* (1) the appellant had been convicted under rule 81, sub-rule (4), of the Defence of India Rules but in the report, on the basis of which cognizance of the offence had been taken, neither the rule which was alleged to have been contravened had been mentioned, nor were any facts given which could show that any rule had been contravened. It was, therefore, held that the report was defective and cognizance of the offence could not have been taken. The case is distinguishable from the present one because, as has already been mentioned in the present case, the rule, which had been contravened, was specifically mentioned and the facts constituting the contravention, viz., that iron had been sold at rates higher than controlled rates

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was also mentioned. In *Rachpal Singh v. Rex* (1) the only thing, which had been mentioned in the report, was that an offence under rule 81(2) of the Defence of India Rules had been committed. No facts were given and the rule which had actually been contravened was also not mentioned. The same appears to have been the defect in the report submitted in the case of *Roshanlal v. Rex* (2). The only thing mentioned in the report submitted in that case was that a contravention of the provisions of paragraph 4 of the Government Order No. 1029, dated the 8th February, 1947, had been committed. But there was not a single word as to what had been done by the accused, which constituted the contravention of the Order. The Assam case *State of Assam v. Deo Kishan Motha* (3) has not been reported in full and we do not know what the contents of the report submitted in that case were. It, however, appears that in that case the allegation was that certain corrugated iron sheets had been removed in violation of a certain notification issued under clause 10(c) of the Iron and Steel (Control of Production and Distribution) Order, 1941, but in the report which had been submitted by the Sub-Inspector there was no attempt to suggest that the removal was itself an offence, or that it was in violation of any notification. All these cases are thus distinguishable from the present case on facts and cannot be said to be authorities for the proposition that every minute detail which is to be subsequently mentioned in the charge to be framed against the accused should find a place in the report, on the basis of which cognizance is to be taken, and that if any such detail is missing, the power to take cognizance becomes absent.

I am, therefore, still of opinion that the first contention of the applicants had no real force and was bound to be rejected.

(1) (1949) 50 Cr. L.J. 469.

(2) 1949 A.L.J. 541.

(3) A.I.R. 1955 N.U.C. (Assam) 4246.

Both the contentions urged in support of the reference were, therefore, untenable. The reference cannot, therefore, be accepted. It is accordingly rejected. Let the record be sent back at an early date so that the trial may proceed.

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*Reference rejected.*

(FULL BENCH) CIVIL MISCELLANEOUS

*Before Mr. Justice Dayal, Mr. Justice Chaturvedi and  
Mr. Justice Jagdish Sahai*

GHULAM MOHIUDDIN (APPLICANT)

*v.*

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THE ELECTION TRIBUNAL, ETAH AND OTHERS  
(OPPOSITE PARTIES)

**Town Area Committee—Election of Chairman—Finality of electoral roll—Power of Election Tribunal to examine correctness of entries in—U. P. Town Act, (No. II of 1914), ss. 6-F(1) and 6(2)—U. P. Town Areas (Conduct of Election of Chairman) Rules, 1953, r. 48.**

S, by means of an election petition, challenged the election of M as the Chairman of the Town Area Committee on, *inter alia*, the ground that the names of a number of minors or non-residents had been wrongly entered in the electoral roll. M's preliminary objection against the issue being raised before and tried by the Election Tribunal being over-ruled, he prayed for a writ of *certiorari* to quash the order of the Election Tribunal.

*Held*, (i) per majority, (DAYAL and CHATURVEDI, JJ.; JAGDISH SAHAI, J. dissenting), that, with regard to the fulfilment of the prescribed qualifications of a person for registration as a voter, the electoral roll is final and conclusive not only upto the stage of voting but for the purposes of the election petition as well. Such finality does not, however, extend to the disqualifications of a voter and the same may be questioned before and tried by the Election Tribunal.

This view of the law is not only based on a true construction of the relevant provisions of the Town Areas Act but is duly supported by the analogous provisions and law regarding other elections in India and England.

(*Per* JAGDISH SAHAI, J.) that the electoral roll in other elections has been made final and conclusive for all purposes by

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means of an express provision either by taking away the power of the Election Tribunal from that sphere or by extending the scope of finality to election petitions and the same cannot, in the absence of a specific provision, be applied to the election of the Chairman of the Town Area Committee.

(2) Unanimously, that the term 'disqualified' is not synonymous with 'not qualified' and that there is a vital difference between the two, both under the U. P. Municipalities Act, 1916, and the U. P. Town Areas Act, 1914.

*Prabhakar Yajnik v. The District Magistrate, Bulandshahr*  
(1) over-ruled on this point.

Civil Miscellaneous Writ no. 1462 of 1958.

The facts appear in the judgment.

S. C. Khare, for the applicant.

The Standing Counsel for the opposite party.

DAYAL, J.:—I agree with brother Chaturvedi that this writ petition be allowed and that a writ of *certiorari* be issued quashing the impugned order of the Election Tribunal. In view of the importance of the question, I would like to note in brief my reasons for coming to that conclusion.

The question is whether the Election Tribunal hearing an election petition challenging the election of the Chairman of the Town Area Committee can look into the contention that the names of certain persons should not have found a place in the electoral rolls prepared for certain wards in the Town Area on the grounds that some of them were minors and that some did not reside within the wards concerned. The Election Tribunal in this case considered whether the finality attached to the electoral roll applied to pre-election stage or also to the post-election stage and held that it applied to the pre-election stage. He came to the same conclusion on considering the effect of the latter provision in clause (a) of paragraph 48 of the Notification no. 165/IX(E)—I-T-47, dated 26th February, 1948, printed at page 23 of the Government of Uttar Pradesh Statutory Provisions and Rules and Notifications Re: election Petitions

relating to Municipal Boards, Town Areas and Notified Areas. Paragraph 48 is—

“48. The election of any person as chairman or member of the committee may be questioned on any of the following grounds:

(a) that such person was declared to be elected by reason of the improper rejection or admission of any or more votes, or for any other reason was not duly elected by a majority of lawful votes;

(b) that such person committed a corrupt practice as defined in rule 49 below for the purpose of the election;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of a petitioner was improperly rejected.”

He expressed his reasons thus:

“If the electoral rolls are regarded as final and conclusive, all the persons who voted on the basis of those rolls would be treated as lawful votes and there is no question of there being any unlawful votes. A vote can be unlawful only if it offends against any of the provisions of the Act or rules, and if, for the decision thereof, it has to be seen whether the vote was lawful or unlawful, then certainly the electoral roll cannot be regarded as final and conclusive at the time of the hearing of election petitions.”

The contention for the appellant is that the electoral roll prepared is not open to question with respect to the correctness of the entries noted therein, though the Election Tribunal can consider whether any of the persons entered in that roll suffered from any disqualification and that the fact that a person had not attained

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the age of 21 years or did not reside within the particular ward does not amount to disqualification. I agree with this contention.

Sub-section (2) of section 8-A of the United Provinces Town Areas Act, 1914, (hereinafter referred to as the Act) is—

“The chairman shall be elected by the electors of the town area at an election held simultaneously with the general election of members of the committee.”

Sub-section (4-A) of section 8-A of the Act is—

“No election of the Chairman shall be called in question except by an election petition presented to such authority and in such manner as may be provided for, by or under this Act.”

Rule 5 of the Uttar Pradesh Town Areas (Conduct of Election of Chairman) Rules, 1953, is—

“Electors for election of Chairman—The electors in a town area shall, for the purpose of election of the chairman, be the electors entered in the electoral rolls of the wards of that town area and it shall not be necessary to prepare or revise separately the electoral rolls for the election of the Chairman.”

Clause (13) of section 2 of the Act provides—

“‘elector’, in relation to a ward, means a person whose name is for the time being entered in the electoral roll of that ward.”

It follows, therefore, that the electors for the purpose of election of the Chairman are the persons whose names are for the time being entered in the electoral rolls of the wards of the Town Area. The expression “for the time being” is significant and can only mean that the entries are to be taken as final for the purpose of holding that those persons are the elections of the Town



Area. The status of an elector is given by the entry of the name in the electoral roll.

Section 6-F of the Act is—

“(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any ward, shall be entitled to vote in that ward.

(2) No person shall vote at an election in any ward if he is subject to any of the disqualifications provided for by or under this Act.

(3) No person shall vote at a general election in more than one ward, and if a person votes in more than one such ward, his votes in all such wards shall be void.

(4) No person shall at any election vote in the same ward more than once, notwithstanding that his name may have been registered in the electoral rolls for that ward more than once, and if he does so vote, all his votes in that ward shall be void.

(5) No person shall vote at any election if he is confined in a prison whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the Police:

Provided that nothing in this sub-section shall apply to a person subject to detention under any law for the time being in force.”

These provisions also mean that every person whose name is for the time being entered in an electoral roll has the right to vote. His right to vote cannot, therefore, be questioned at any stage—be it at the time of the election or at the stage of the hearing of the election petition after election. His right is, however, taken away if for any reason he happens to be subject to any of the disqualifications provided for by or under the Act.

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This, therefore, takes us to the determination of what are the disqualifications which take away the right of voting from an elector, that is, a person whose name is for the time being entered in the electoral roll of a ward. Sub-sections (3), (4) and (5) of section 6-F of the Act provide other circumstances which take away the right of a person to vote on the basis of the entry of his name in the electoral roll. He cannot take advantage of his name being entered in the rolls of several wards by voting as many times as be the number of the entries. He can vote only in one ward and in case he votes in more than one ward his votes in all such wards become void. Similarly, a person whose name is entered more than once in the electoral rolls of a particular ward cannot vote as many times as be the number of the entries but can only vote once and if he votes more than once all his votes become void. These provisions further make it clear that, in the first place, it is the existence of a person's name in the electoral roll of a ward which gives him the right to vote and that this right is taken away completely if the aforesaid sub-sections apply to him, and that his right to vote on the basis of several entries, be they in the rolls of different wards or in the roll of one particular ward, is subject to the condition that he can vote only once. In the present case, we are not concerned with the provisions of sub-sections (3), (4) and (5) affecting the validity of the votes cast. We are concerned with the question whether the voters, who had not attained the age of 21 years or who did not reside within the ward in whose electoral rolls their names were recorded, suffer from a disqualification contemplated by sub-section (2) of section 6-F of the Act.

Section 6-H of the Act empowers the State Government to apply, by Order, to an election under the Act the provisions of the U. P. Municipalities Act, 1916, regarding preparation and publication of electoral rolls

for each ward including qualifications and disqualifications for registration in the electoral rolls. Sections 12-B to 12-H of the Municipalities Act have been applied to an election under the Act. Section 12-C of the Municipalities Act is—

“12-C. Subject to the provisions of section 12-D, every person who is qualified to be registered in the Assembly electoral roll relating to the area comprised in the ward or whose name is entered therein shall be entitled to be registered in the electoral roll of the ward.”

Section 12-D is—

“12-D. (1) A person shall be disqualified for registration in an electoral roll if he is disqualified for registration in the Assembly rolls.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll of the ward in which it is included:

Provided that the name of any person struck off the electoral roll of a ward by reason of disqualification under sub-section (1) shall forthwith be reinstated in that roll if such disqualification is, during the period such roll is in force, removed under the provisions of this Act, or under any other law authorizing such removal.”

Section 16 of the Representation of the People Act, 1950, (XLIII of 1950), is:

*“Disqualifications for registration in an electoral roll—*

(1) A person shall be disqualified for registration in an electoral roll if he—

(a) is not a citizen of India; or

(b) is of unsound mind and stands so declared by a competent court; or

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(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt and illegal practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:

Provided that the name of any person struck off the electoral roll of a constituency by reason of disqualification under clause (c) of sub-section (1) shall forthwith be reinstated in that roll if such disqualification is, during the period such roll is in force, removed under any law authorizing such removal."

This section does not mention that a person who has not attained the age of 21 years or who does not reside within a constituency is disqualified for registration in an electoral roll of that constituency. Sections 17 and 18 provide against a person being registered more than once either in the same constituency or in different constituencies. Section 19 is—

*"Condition of registration*—Subject to the foregoing provisions of this Part, every person who—

(a) has been ordinarily resident in a constituency for not less than 180 days during the qualifying period, and

(b) was not less than 21 years of age on the qualifying date,

shall be entitled to be registered in the electoral roll for that constituency."

The age and residence, therefore, were considered as conditions for registration. A person got the right to be enrolled or was qualified to be enrolled in an electoral roll, if he was not less than 21 years of age and if he had resided for the prescribed period in a particular constituency. A person's non-residence for the prescribed

period or not attaining the age of 21 years is not his disqualification for registration but amounts to his being not qualified to be registered. So long as one is not qualified, no question of disqualification arises. According to Murray's New English Dictionary, 'disqualification' means "the action of depriving of requisite qualification is, therefore, not identical with the absence of qualifications required for some purpose". A disqualification is, therefore, not identical with the absence of qualification. It is further to be noticed that sub-section (2) of section 16 of the Representation of the People Act provides for the striking off the name from the electoral roll of a person who becomes disqualified after registration and does not provide for the striking off the name of a person who was disqualified but whose disqualification could not be discovered at the time of entering his name in the electoral roll. His disqualification could be considered by the Election Tribunal if he had exercised his right to vote on the basis of the entry of his name in the electoral roll of a particular constituency.

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The Election Tribunal held that the reverse of the qualifications mentioned in sections 17, 18 and 19 of the Representation of the People Act would amount to a disqualification. This view finds support from the case of *Prabhakar Yajnik v. District Magistrate, Bulandshahr* (1) wherein MOOTHAM, J., (as he then was), had to consider the scope of the expression "disqualification" in section 12-D of the Municipalities Act and said at page 669:

"The conclusion which I have reached, although not without some hesitation, is that in Section 12-D of the Municipalities Act the word 'disqualified' is used as meaning the opposite to 'qualified', that is, as meaning 'not qualified'."

(1) 1953 A.L.J. 667.

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With respect, I do not agree with this interpretation for the reasons mentioned above. It is true that the name of a person who suffers from any of the disqualifications mentioned in section 16 will not be entered in the electoral roll, though he satisfies the conditions of registration and, therefore, the result would be the same as would be if the person did not satisfy the conditions of registration mentioned in section 19. But the rationale of the non-entry is different in the two cases. In the former case a person satisfies the conditions and, therefore, has the right to have his name entered in the electoral roll and it is due to the disqualification that his name is not entered. Notionally it can be said that on the basis of his right his name had been entered but had been removed on account of the disqualification, though this will not be exactly correct as sub-section (2) of section 16 does not provide for the removal of the name of a person who had the disqualification prior to the registration of his name in the electoral roll.

Section 19 of the Municipalities Act has been made applicable to the election of members of the Town Area. Its sub-section (1) is practically the same as paragraph 48 of the notification governing the election petitions, questioning the election of Chairman of a Town Area. Its sub-section (2) is:

“(2) The election of any person as a member of a Town Area Committee shall not be questioned—

(a) on the ground that the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in, the electoral roll or rolls;

(b) on the ground of any non-compliance with this Act or any rule, or of any mistake in the forms required thereby, or of any error, irregularity or informality on the part of the officer or officers charged with carrying out this Act or any

rules, unless such non-compliance, mistake, error, irregularity or informality has materially affected the result of the election."

The absence of any similar provision in the aforesaid paragraph 48 is relied upon for the respondent in support of the contention that the election of a Chairman is open to question on the ground that the name of a person not qualified to vote had been inserted in the electoral roll or rolls. I am of opinion that no such inference can be drawn from a mere omission unless a ground for challenging the election can be deduced from the grounds of challenge mentioned in paragraph 48. The relevant portion of this paragraph relied upon for the purpose is the ground that such person for any other reason was not duly elected by a majority of lawful votes. The contention is that if a person was not entitled to have his name entered in the electoral roll, he could not cast a lawful vote and, therefore, the Election Tribunal could look into this question. I do not agree. A lawful vote is one which is cast by a person who had the right to vote in circumstances which do not in any way invalidate the vote. I have already mentioned that the right to vote is given by section 6-F of the Act to a person who is for the time being entered in the electoral roll of any ward. If a person whose name is entered on the roll votes, his vote is *prima facie* a lawful vote. It can become an unlawful vote for various reasons. It would be an unlawful vote if any of the provisions of sub-sections (2) to (5) of section 6-F affect the validity of the vote. It can also be an unlawful vote if it has been obtained by corrupt practice. It cannot, however, be an unlawful vote merely on account of the fact that the person had no right to have his name entered in the electoral roll. The right to vote is not on account of his having attained a certain age or on account of his having resided in a certain constituency

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for the prescribed period but is conferred by sub-section (1) of section 6-F of the Act and is simply based on the existence of his name in the electoral roll of any ward. The vote of a person having a right to vote is, therefore, a lawful vote, and it is, therefore, not open to the Election Tribunal to go behind the electoral roll to determine whether the entry of the persons named in the electoral roll was rightly made or not. In this connection we have been referred to section 6-A of the Act which provides that the election of the members of a Committee shall be on the basis of adult suffrage. The view I take does not in any way offend this provision. The election is on the basis of adult suffrage as the entries in the electoral roll are on that basis. The mere fact that the name of a person has been wrongly entered in the electoral roll when he had not attained a particular age does not make the election to be on any other basis. Section 6-F of the Act provides that no person who is not for the time being entered in the electoral roll of any ward shall be entitled to vote in that ward. Taking the two sections 6-A and 6-F together, the only conclusion that can be formed is that it is the provisions of section 6-F which determine the right of a person to vote and it is not the fact of his actually becoming an adult which gives him the right to vote. In this connection I may mention that there is nothing in the Act which lays down what the requirements of adult suffrage are. Article 326 of the Constitution does not stop after providing that the election will be on the basis of adult suffrage but explains this provision by saying: 'that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal



practice, shall be entitled to be registered as a voter 'at any such election'.

I am, therefore, of the opinion that it was not open to the Election Tribunal to determine whether the persons whose names were entered in the electoral roll possessed the necessary qualifications for the registration of their names in the electoral roll.

CHATURVEDI, J.:—This petition has been ordered to be laid before a Full Bench for hearing, because the Bench, which heard it, was of the opinion that the view taken in a previous Division Bench case, namely, *Prabhakar Yajnik v. The District Magistrate, Bulandshahr* (1), needed further consideration.

The facts of the case in brief are that the petitioner and the 2nd respondent were candidates for election to the office of Chairman, Town Area Committee, Sakit, district Etah, in the general elections held in October, 1957. The petitioner was declared to be the duly elected candidate as he received 581 votes as against the 2nd respondent who received 569 votes. The 2nd respondent then filed an election petition challenging the validity of the petitioner's election on a number of grounds. The Temporary Civil and Sessions Judge of Etah was appointed to hear and decide the election petition. The petitioner filed a written statement before him challenging the correctness of all allegations made by the 2nd respondent in his election petition. The Election Tribunal framed a number of issues in the case, but we are concerned in the present writ petition only with one of them, namely, issue no. 3, which is in the following words:

"Is the petitioner entitled to challenge the enrolment and addition of the voters of Schedule A, B, C and D in the electoral rolls at this stage? Its effect?"

(1) 1953 A. L. J. 667.

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The allegation of the 2nd respondent in the election petition, which gave rise to the above issue, was that the names of a number of persons, who were minors, and of others, who were not residents within the limits of the Town Area, were wrongly added in the electoral rolls prepared for the Town Area. The petitioner denied that any names of minors or non-residents had been added in the electoral roll and further pleaded that the electoral roll was final and its correctness could not be challenged in the proceedings of the election petition. The Election Tribunal heard the arguments on this issue treating it to be a preliminary issue and decided it against the petitioner by the impugned order dated the 29th April, 1958. The Election Tribunal has arrived at the conclusion that it is open to the 2nd respondent to raise the question in the election petition that the electoral roll had been wrongly prepared.

In the present writ petition the correctness of this order has been challenged and it is prayed that this Court should issue a writ of *certiorari* quashing the order of the Election Tribunal.

The learned counsel for the petitioner has urged that there is an apparent error in the judgment of the Election Tribunal and the tribunal is clearly wrong in holding that the correctness of the electoral roll could be challenged in an election petition. The learned counsel for the 2nd respondent has tried to support the decision of the Election Tribunal on the point. The only question that arises for consideration by us is whether an Election Tribunal can go into the question that the names of some of the persons had been wrongly entered in the electoral roll, when the persons were not qualified to have their names so entered.

In order to appreciate the controversy it is necessary to mention the relevant provisions of law on the point. The elections were held for choosing the Chairman of

the Town Area of Sakit, in the district of Etah. The electoral rolls in the Town Areas situate in this State are to be prepared under the relevant provisions of the U. P. Town Areas Act, (Act no. II of 1914), has amended from time to time. It is not necessary to refer to earlier amendments made in the Act before the U. P. Act no. V of 1953 was passed. By the latter Act, substantial amendments were made in the U. P. Town Areas Act. Section 6-A lays down that the election of the members of a Town Area Committee shall be on the basis of adult suffrage. Section 6-B says that for purposes of elections there shall be wards provided by Order issued under section 6-H. Section 6-C lays down that there shall be an electoral roll for every ward which shall be prepared in the manner provided for by or under the Town Areas Act. The next section which may be referred is section 6-F which makes provision as regards the persons who shall be entitled to vote in the ward. Section 6-H provides that the State Government may, by order, apply to an election under the Act the provisions of the U. P. Municipalities Act of 1916 regarding delimitation of wards for purposes of elections, preparation and publication of electoral rolls for each ward, including qualifications and disqualifications for registration in the electoral rolls, conduct of elections, the removal of disqualifications, the decision on doubts or disputes relating to elections and certain other matters. Section 6-I(1) bars the jurisdiction of civil courts to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll of a ward, or the legality of any action taken by or under the authority of an Electoral Registration Officer, or to question the legality of any action taken or any decision given by the Returning Officer. Subsection (2) says that no election can be called in question except by an election petition presented in accordance with the provisions of the Act. Section 6-J pro-

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vides for qualifications for membership of the Committee, and section 6-K provides for disqualifications from being chosen as a member or Chairman of the Committee. The last relevant section is section 8-A which makes certain provisions concerning the election, duties and other matters pertaining to a Chairman. Sub-section (1) provides that the Chairman shall be an elector of the Town Area. Sub-section (2) says that the Chairman shall be elected by the electors of the Town Area at an election held simultaneously with the general election of members of the Committee. Sub-section (3) lays down how a vacancy in the office is to be filled and sub-section (4) says that the term of office of a Chairman shall expire on the expiry of the term of the Town Area Committee. Sub-section (4-A) says:

"No election of the Chairman shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under this Act."

With the rest of the sub-sections we are not concerned.

It would appear that under the Town Areas Act the election of the members of a Committee is to be held on the basis of adult suffrage and there shall be an electoral roll prepared in the manner provided by or under the Act. The Act itself does not lay down the procedure for the preparation of the electoral roll and authority in that respect has been conferred on the State Government under clause (b) of section 6-H. The Government framed separate rules under the Town Areas Act for the conduct of elections of members and of Chairman. There was also an Order issued called the Town Areas (Preparation and Revision of Electoral Rolls) Order, 1953. It is not necessary to go into details of the above rules and orders for our present purposes.

I have already stated that under section 6-H (a) and (b) the State Government was authorised to apply the

provisions of the U. P. Municipalities Act regarding delimitation of wards for purposes of elections and preparation and publication of electoral rolls for each ward, including qualifications and disqualifications for registration in the electoral rolls. Under the above provision, the U. P. Government issued a notification on the 8th April, 1953, applying, amongst others, the provisions of sections 12-B to 12-H of the Municipalities Act to the Town Areas Act. Sections 12-C and 12-D are important. Section 12-C says that every person, who is qualified to be registered in the Assembly electoral roll relating to the area comprised in the ward, or whose name is entered therein, shall be entitled to be registered in the electoral roll of the ward. Section 12-D says that a person shall be disqualified for registration in the electoral roll if he is disqualified for registration in the Assembly electoral rolls. For elections to Municipal Boards the Legislature thus accepted the Assembly electoral rolls as the electoral rolls for the relative areas of the Municipal Board. By the application of section 12-C and section 12-D to the Town Areas, the same rolls became the rolls for electing members and Chairman of the Town Areas Committees. Thus for finding out the qualifications and disqualifications for entry in the rolls for elections to Town Areas, we have to go to the Representation of the People Act of 1950. Section 16 of the said Act lays down the disqualifications for registration in an electoral roll and section 19 lays down the conditions of registration, which are only two, namely, the minimum age limit of 21 years and the ordinary residence in a constituency. The disqualifications mentioned in section 16 are three, which need not be detailed. Apart from sections 16 and 19 of the Representation of the People Act, section 6-A of the Town Areas Act further says that the election of the members of a Committee shall be on the basis of adult suffrage.

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It would thus appear that the Representation of the People Act has separately provided for the conditions which a person must fulfil before he would be entitled to have his name entered in the electoral roll and the disqualifications which would disqualify him from having his name so entered, even if he fulfils the conditions. The contention of the learned counsel for the petitioner is that the entries in the electoral roll are final and not open to challenge in an election petition, in so far as they indicate that a person has fulfilled the conditions or qualifications for having his name brought on the electoral roll, but they are not final and are open to scrutiny by an Election Tribunal in so far as the allegation that the persons are disqualified from voting is concerned. In short, the electoral roll is to be deemed final and conclusive as far as the fulfilment of qualifications of a voter is concerned, but it is not to be deemed final and conclusive by the Election Tribunal so far as the disqualifications attaching to such persons are concerned. I think that there is substance in the contention of the learned counsel.

The subject of election petitions is dealt with in section 1 of Part IV of Halsbury's Laws of England, Vol. 14, 3rd Edition. Item (vii) deals with scrutiny and after considering its history it is stated at the bottom of paragraph no. 544:

"Accordingly it would appear that the votes of persons who were not entitled to be registered because they did not have a resident or non-resident or a service qualification would not be questioned on a scrutiny."

The above statement is based on two cases. I propose to refer to only the latter of the two cases, namely, *Petersfield Stowe v. Jolliffe* (1). After a consideration of the history of legislation on the point, Lord

(1) (1874) L. R. 9 C. P. 724.

Coleridge, C.J., expressed the opinion that from the Reform Act to the Ballot Act the tendency of legislation had been to make the register of voters conclusive, with certain exceptions. He then says at page 750:

"I think the true construction of these sections, which alone remain, is, to make the register conclusive not only on the Returning Officer, but also on any Tribunal which has to enquire into elections, except in the case of persons ascertained by the proviso. These are 'persons prohibited from voting by any statute or by the common law of Parliament'."

The law laid down above still holds the field in England and it is well settled there that it is not open to a Tribunal which has to enquire into elections to consider the correctness of the entry in a register of voters, except in so far as to see whether the person whose name is entered was prohibited from voting by any statute or by the common law of Parliament. I think the Representation of the People Act has adopted the same principle and that is the reason why separate provisions have been made laying down the conditions of registration in the electoral roll for Assembly constituency and those laying down disqualifications for registry in the roll. Section 19 of the Act deals with the former and section 16 with the latter. As far as the preparation of the electoral roll itself is concerned, the authority responsible for its preparation has got to consider both matters. It has to see whether a citizen fulfils the conditions of registration and also whether he is disqualified for registration in the roll. There was no reason for providing for the above two matters under two separate sections of the Act so far as the preparation of the roll was concerned. It could easily have been said under section 16 that a person shall be disqualified for registration in the electoral roll if he was less than 21 years of age and if

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he did not ordinarily reside in the constituency. The only reason for making two separate provisions about qualifications and disqualifications, in my opinion, is that the two have been treated differently, as in England, so far as the binding nature of the entry in the electoral roll is concerned. If a person's name has been entered in the electoral roll, as it has been finally prepared, the entry would be taken to be conclusive proof of the fact that the person fulfils the conditions, namely, that he was not less than 21 years of age and was ordinarily resident in the constituency. But the position with respect to the disqualifications enumerated in section 16 of the Representation of the People Act is different. In spite of the entry in the electoral roll, it is open to an Election Tribunal to see whether the person was really disqualified for registration in the roll. Finality has been given to the decision of the officer preparing the roll in so far as the fulfilment of conditions of registration is concerned. But it has not been considered desirable to extend the same finality to the decision on the subject of disqualifications, as the latter is a more serious matter. The U. P. Town Areas Act is quite explicit on the point. Section 6-F (1) says:

"No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any ward, shall be entitled to vote in that ward."

The above provision confers a right on a person, whose name is entered in the electoral roll, to exercise his franchise. The right to vote that has been conferred is simply by virtue of the fact that his name is entered in the electoral roll. This obviously means that it is not possible to go behind the roll either for proving that a person's name should have been entered but has been wrongly omitted, or for showing that a person's name should not have been entered but has been wrongly entered. If the above provision of law had stood



by itself, it might have been possible to say that the Election Tribunal could not consider even the question whether a person had any disqualifications which disentitled him to have his name entered in the electoral roll. But, following the English practice, it has been provided in sub-section (2) that—

“(2) No person shall vote at an election in any ward if he is subject to any of the disqualifications provided for by or under this Act.”

This is in the nature of an exception to sub-section (1), and the exception is confined to persons suffering from disqualifications. Section 6-F was inserted in the U. P. Town Areas Act in 1953 and it can be presumed that the Legislature was aware of the fact that in the Representation of the People Act qualifications and disqualifications were separately dealt with in sections 16 and 19. Still sub-section (2) of section 6-F of the Town Areas Act imposes a restriction on the right of voting on persons subject to disqualifications and not on persons not fulfilling the qualifications or conditions of registration in the roll.

So far the position appears to be clear, but the learned counsel for the respondent laid stress on the wording of rule 48 framed by the Government under section 6-H of the Town Areas Act. These rules were subsequently validated by U. P. Act no. XIX of 1955. The language of rule 48 in all material particulars is the same as of section 19(1) of the U. P. Municipalities Act. Section 19(1)(b) is in the following words:

“That such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful votes.”

Stress has been laid on the words of “lawful votes” and it is argued that votes cast by persons, who were not qualified to be entered in the electoral roll, cannot be said to

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be lawful votes. I think that in construing the above words we have to refer back, for purposes of the Town Areas Act, to section 6-F (1) wherein it is stated that every person who is, for the time being entered in the electoral roll of any ward, shall be entitled to vote in that ward. To my mind, it is no straining of language to say that the vote of such a person would be a lawful vote. It is true that section 6-A of the Town Areas Act lays down that the election of the members shall be on the basis of adult suffrage, and section 19 of the Representation of the People Act lays down that the minimum age for entry in the electoral roll is 21 years. But that is a matter which has been left for the authority preparing the electoral roll to decide finally. The mere entry thus means that person has fulfilled the necessary qualifications or conditions of enrolment and it is not open to objection at any subsequent stage, after the electoral roll has become final, that the person so entered really did not fulfil the conditions. His name being there, it must be taken that he fulfils the conditions. The Nagpur High Court has taken the same view in the cases of *Mahadeo Nathuji v. Bisan Laghuji* (1), and *Vithal Das Kunwarji v. Sadanand Jumman Fulzele* (2).

The learned counsel for the respondent relied upon two cases of this Court. The first case mentioned by him is the case of *Prabhakar Yajnik v. The District Magistrate, Bulandshahr* (3). The facts of this case are clearly distinguishable from the facts of the case before me. Prabhakar Yajnik's name was ordered to be removed from the Municipal electoral roll by the Electoral Registration Officer and Sri Yajnik approached this Court with a writ petition praying for the quashing of the order removing his name. The question that arose was whether the Electoral Registration Officer had jurisdiction to remove the name and this Court held

(1) A. I. R. 1953 Nag. 166.

(2) A. I. R. 1957 Nag. 63.

(3) 1953 A. L. J. 667.

that he had jurisdiction to do so. What this Court had to decide in *Prabhakar Yajnik's* case (1) was whether the Electoral Registration Officer had jurisdiction to remove the name on the ground of want of qualifications. But the question before me in the present case is whether the *election tribunal* can go into the question that a person whose name stood on the electoral roll did not fulfil the conditions for the entry of his name. In the course of the judgment, the learned Judges have made certain observations to the effect that there did not appear to be any difference between saying that a person was not qualified and saying that he was disqualified. I think there is a difference between the two and that difference I have already indicated above. The exact point, however, decided in that case does not arise for decision in the present petition.

The other Allahabad case cited by the learned counsel is the case of *Shyam Kishore v. Madan Gopal Mahendra* (2). This case arose out of an election petition by a candidate for the presidentship of the Municipal Board of Sitapur, whose nomination paper had been rejected by the Returning Officer on the finding that he had not attained the age of 30 years. He filed the election petition on the ground that his nomination paper had been improperly rejected by the Returning Officer. The election petition was allowed on the finding that the decision of the Returning Officer was wrong and the petitioner had attained the age of 30 years. A writ petition was then filed challenging the order of the Election Tribunal and the contention was that the Election Tribunal had no jurisdiction to arrive at a finding as to the age of the respondent on the basis of additional evidence recorded by it. This Court held that it was open to the Election Tribunal to consider the question of age of the person whose nomination paper had been reject-

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(2) A. I. R. 1958 All. 14.

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ed, because one of the grounds on which the election petition could be filed was that the nomination paper of the petitioner was improperly rejected. It was further observed that the rejection of a nomination paper had been previously held to be a ground even falling within the expression "was not elected by a majority of the lawful votes". The question before me in the present case is clearly different, and the Division Bench, which decided *Shyam Kishore's* case (1), did not consider and was not called upon to consider whether the entry of the name in the electoral roll could be challenged before the Election Tribunal on the ground that the person whose name was so entered did not fulfil the necessary conditions. It was called upon mainly to consider whether the ground could be said to fall within the expression "the nomination paper was improperly rejected", and it answered the question in the affirmative. That case also thus does not help the respondent.

The last case cited by the learned counsel for the respondent is the case of *Durga Shanker Mehta v. Raghuraj Singh* (1). In this case one of the questions for decision was whether it was open to the Election Tribunal to allow the election petition on the ground that the Returning Officer had improperly accepted the respondent's nomination paper. The case was governed by the Representation of the People Act of 1951, which lays down in section 100 the grounds on which the election of a member to a Legislative Assembly or Lok Sabha can be challenged. The learned Judges held that in that case the Election Tribunal could not allow the election petition on the ground that the nomination paper had been wrongly accepted by the Returning Officer, but it could have allowed the election petition on the ground of constitutional disqualifications of the candidate. This case also does not, in any way, help

(1) A. I. R. 1958 All. 14.

(2) A. I. R. 1954 S. C. 520.

the respondent, as the points for decision were very different. But there is an important observation in the judgment, which to some extent supports the view that I have taken above. Their Lordships say:

"The English law after the passing of the Ballot Act of 1872 is substantially the same as has been explained in the case of *Stowe v. Jolliffe* (1). The register which corresponds to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament."

Their Lordships did not say that the law in India in this respect is different from that of England.

For the reasons given above, I have come to the conclusion that the impugned order of the Election Tribunal is clearly erroneous. I would accordingly allow this writ petition with costs and direct the issue of a writ of *certiorari* quashing the impugned order of the Election Tribunal.

J. SAHAI, J.:—I have read with the greatest respect the learned judgments of my brothers, DAYAL and CHATURVEDI, but for reasons, which I shall state in this judgment, I am unable to agree with their views and, therefore, it has become necessary for me to give my reasons for the disagreement and to express my own views, in respect of the matter which has been referred to us, in a separate judgment.

It is not necessary to give in details the facts giving rise to the present case. It is sufficient to state that the petitioner was declared duly elected Chairman of the Town Area Committee, Sakit, defeating the respondent No. 2. The respondent No. 2 filed an election petition challenging the election of the petitioner on several grounds. One of the grounds of the respondent No. 2 in the election petition was that the names of a number of persons who were minors and of others who were not

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(1) (1874) 9 C. P. 734.

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residing within the limits of the Town Area of Sakit had been wrongly added in the electoral roll prepared for the said Town Area. The petitioner denied the allegations mentioned above and also raised a legal plea that the electoral roll was final and its correctness could not be challenged in the proceedings before the Election Tribunal. The Election Tribunal framed several issues in the case. Issue No. 3 runs as follows:

"Is the petitioner entitled to challenge the enrolment and addition of the voters of Schedules A, B, C and D in the electoral rolls at this stage? Its effect?"

Treating this issue as a preliminary issue the Election Tribunal decided it against the petitioner on 29th April, 1958, holding that the tribunal could go into the question whether certain persons whose names were entered in the electoral roll were lawful voters or not. The present writ petition is directed against the finding of the election tribunal on this issue, and the prayer in the petition is for the quashing of the order of the Election Tribunal mentioned above by this Court by means of a writ of *certiorari*. There is also a prayer for the issue of a writ of *mandamus* or order or direction in the nature of *mandamus*, directing the Election Tribunal to decide the election petition in accordance with the directions of this Court. This petition came up for hearing before a Division Bench of this Court, who by their order dated 30th of July, 1958, have referred the case to a Full Bench and the petition has accordingly been listed before us for hearing.

The main question for decision in the case is whether under the provisions of the U. P. Town Areas Act and the Rules framed thereunder it is permissible for an Election Tribunal to go into the question whether the names of certain persons entered in the electoral roll were rightly or wrongly entered. It is well known that

the right to get elected as the Chairman of a Town Area Committee is not a common law right; it is a right created by the U. P. Town Areas Act. Similarly, the right to challenge an election is also not a common law right and must be exercised within the limitations imposed by the Act or the Rules creating that right. Section 8(4A) of the U. P. Town Areas Act runs as follows:

"No election of the Chairman shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under this Act."

Rule 48 of the Rules framed under the U. P. Town Areas Act, (hereinafter referred to as the Rules), deals with election petitions relating to the election of the Chairman. It runs as follows:

"The election of any person as Chairman or member of the committee may be questioned on any of the following grounds—

(a) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful votes;

(b) that such person committed a corrupt practice as defined in rule 49 below for the purpose of the election;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of a petitioner was improperly rejected."

It may be mentioned that this rule does not now apply to the election of a member of the committee because sections 19 to 28 of the U. P. Municipalities Act have been made applicable to Town Areas elections under section 6-H of the U. P. Town Areas Act and, therefore,

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the words "or member" in the beginning of rule 48 are redundant. However, that does not in any way affect the question that is for consideration before us. I am of the opinion that the words "or for any other reason" was not duly elected by a majority of lawful votes" occurring in clause (a) of rule 48 of the Rules are wide enough to include the investigation of the question of the right of a person to be entered in the electoral roll. It would be noticed that the expression "or for any other reason" is extremely wide. One of the rules of interpretation of statutes is that effect must be given to every word appearing in a section or rule. The substance of clause (a) of rule 48 of the Rules, to my mind, is that it would be lawful for a petitioner to challenge the entry of a person's name in the electoral roll, and for the Election Tribunal to determine whether or not his name could be entered on the electoral roll under the law. I find nothing in clause (a) of rule 48 of the Rules, which limits the right of the petitioner to urge, and that of the Election Tribunal to hold, that a particular person declared elected has not been elected by a majority of lawful votes because some persons whose names have been entered on the electoral roll could not be voters under the law. I consider the use of the words "for any other reason" by the legislature as denoting that, on whatsoever a ground, the legality of a vote may be challenged. If the intention was not to keep the jurisdiction of the Election Tribunal so wide, I fail to see why the legislature used this expression, which necessarily has a very wide import. The expression "lawful votes" also to my mind is a very wide expression and the tribunal cannot be precluded from going into the question of the legality of a vote to its very root. In this connection it is worthy of note that in the U. P. Municipalities Act, as also the U. P. District Boards Act, where provisions similar to rule 48(a) exist, a sub-section in the nature of proviso



has been added which curtails the effect of the words "or for any other reason was not duly elected by a majority of lawful votes." Section 19 of the U. P. Municipalities Act, which deals with an election petition relating to the election of a member of a Municipal Board and which is similar to rule 48 of the Rules, runs as follows:

"Power to question municipal election by petition. (1) The election of any person as a member of a board may be questioned by an election petition on the ground—

(a) that such person committed during or in respect of the election proceedings a corrupt practice as defined in section 28;

(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful votes;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of the petitioner was improperly rejected.

(2) The election of any person as a member of a board shall not be questioned—

(a) on the ground that the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in the electoral roll or rolls;

(b) on the ground of any non-compliance with this Act or any rule, or of any mistake in the forms required thereby, or of any error, irregularity or informality on the part of the officer or officers charged with carrying out this Act or any rules, unless such non-compliance,

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mistake, error, irregularity or informality has materially affected the result of the election."

A provision analogous to sub-section (2) of section 19 of the U. P. Municipalities Act does not find place in rule 48 of the Rules. By virtue of the provisions of clause (a) of sub-section (2) of section 19, the question whether "the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in the electoral roll or rolls," cannot be gone into by an Election Tribunal created under the provisions of the U. P. Municipalities Act.

It would be noticed that the provisions of section 19 of the U. P. Municipalities Act apply also to election petitions relating to the election of a person as a member of a Notified Area. Therefore, with regard to Notified Areas also, there is a definite provision which debars the Election Tribunal from entering into the question of the correctness or otherwise of an entry in the electoral roll.

The provisions of section 15 of the U. P. District Boards Act are similar to rule 48 of the Rules. The said section 15 runs as follows:

"Power to question election by petition—(1) The election of any person as a member of a board may be questioned by an election petition on the ground—

(a) that such person committed during or in respect of the election proceedings a corrupt practice as defined in section 24; or

(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful votes; or

(c) that such person, though enrolled as an elector, was disqualified for election under the provisions of sub-section (2) of section 12;

(d) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of the petitioner was improperly rejected.

(2) The election of any person as a member of a board shall not be questioned—

(a) on the ground that the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in, the electoral roll or rolls;

(b) on the ground of any non-compliance with this Act or any rule or of any mistake in the forms required thereby, or of any error, irregularity or informality on the part of the officer or officers charged with carrying out this Act or any rules, unless such non-compliance, mistake, error, irregularity or informality has materially affected the result of the election."

It would be noticed that clause (b) of section 15(1) of the U. P. District Boards Act is similar to clause (a) of rule 48 of the Rules. There is, however, in section 15(2) of the U. P. District Boards Act a clause similar to one in section 19 of the U. P. Municipalities Act, but an analogous provision is not to be found in rule 48 of the Rules. The election of the President of either a Municipal Board or a District Board is not a direct election but an indirect election i.e., they are elected by the members of the Municipal Board or the District Board as the case may be and not by the general public. There is, therefore, no question of there being any provision which may enable an election petition being filed on the ground of a person's name having been omitted from, or a person's name having been wrongly entered in, the electoral roll. Consequently, there is no provision in section 43-B of the U. P. Municipalities Act similar to rule 48(a) of the Rules or section 19(2) (a) of

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the U. P. Municipalities Act and section 15(2) (a) of the U. P. District Boards Act. The provisions of section 19 of the U. P. Municipalities Act apply to election petitions challenging the election of member of a Town Area Committee, with the result that even in the case of a member of a Town Area the jurisdiction of the Election Tribunal to go into the question of the correctness of an electoral roll has been excluded by the provisions of section 19(2) of the U. P. Municipalities Act. The Town Areas Act, the Municipalities Act and the District Boards Act are all Acts of the U. P. Legislature. To me it appears that whenever the legislature wanted to exclude the jurisdiction of an Election Tribunal from entering into the question of the correctness or otherwise of the electoral roll, they have expressly said so in the very sections which deal with election petitions. Inasmuch as that has not been done in connection with an election petition regarding the election of the Chairman of a Town Area Committee, there is no provision which in any manner curtails the scope of rule 48(a) of the Rules. What is remarkable is that whereas practically the same words, as are found in rule 48(a) of the Rules, find place in section 19 of the U. P. Municipalities Act and section 15 of the U. P. District Boards Act, provisions similar to those contained in section 19(2) of the U. P. Municipalities Act and section 15(2) of the District Boards Act do not find any place in rule 48 of the Rules. The result is that there is nothing which curtails the right of a person filing an election petition to challenge the election of a person on the ground that some persons who could not have been enrolled as voters have been enrolled. If the intention of the rule-making authority was to exclude the jurisdiction of an Election Tribunal from going into the question of the correctness or otherwise of the electoral roll, it could have either made the provisions of section 19 of the U. P. Municipalities Act applicable also to election petitions regard-

ing the election of the Chairman of a Town Area Committee as was done in the case of the members of the Town Area Committee, or could have added a sub-rule analogous to section 19(2) (a) of the U. P. Municipalities Act or section 15(2) (a) of the U. P. District Boards Act. It would also be noticed that in section 6-I of the U. P. Town Areas Act the jurisdiction of the Civil court has been expressly barred to go into the question as to whether or not a particular person is entitled to be entered in the electoral roll. There is no such restriction on the power of an Election Tribunal appointed under the provisions of the Rules. Section 6-I of the U. P. Town Areas Act runs as follows:

“6-I. (1) No Civil court shall have jurisdiction—

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll of a ward; . . .”

It appears to me that if it was the intention of the legislature that the jurisdiction of an Election Tribunal should also be barred in respect of this matter, they could have made a provision similar to section 6-I(1) (a) of the Town Areas Act. The fact that the legislature has not done so, along with the fact that the language of rule 48(a) of the Rules is wide enough to include the examination of the right of a person to be entered in the electoral roll, and the further fact that though in other cases there are express provisions curtailing the right of the Election Tribunal to go into that question, there is no such curtailment in the case of an Election Tribunal contemplated by rule 48, show that the Election Tribunal is competent in the present case to go into the question of the correctness or otherwise of the electoral roll. The argument that there has been an accidental omission in not adding a sub-rule analogous to section 19(2) (a) of the Municipalities Act or section 15(2) (a)

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of the District Boards Act does not appeal to me because we have to construe the rule as it stands, and, if there has been an omission, the rule-making authority can make suitable amendments. In my opinion it is not possible for a court to depart from the plain meaning of the rule.

Reliance has been placed upon section 6-F of the U. P. Town Areas Act and it is contended that inasmuch as a person whose name is entered in the electoral roll is entitled to vote, it cannot be said that his vote is not a lawful vote. Section 6-F of the Town Areas Act runs as follows:

"6-F. (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any ward, shall be entitled to vote in that ward.

(2) No person shall vote at an election in any ward, if he is subject to any of the disqualifications provided for by or under this Act.

(3) No person shall vote at a general election in more than one ward, and if a person votes in more than one such ward, his votes in all such wards shall be void.

(4) No person shall at any election vote in the same ward more than once, notwithstanding that his name may have been registered in the electoral rolls for that ward more than once, and if he does so vote, all his votes in that ward shall be void.

(5) No person shall vote at any election if he is confined in a prison whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subject to detention under any law for the time being in force."

The argument is that inasmuch as sub-section (1) of section 6-F gives a person absolute right to vote if his name is entered in the electoral roll it cannot be said that his vote is not a lawful vote for the purposes of rule 48 of the Rules. In my opinion section 6-F deals with the manner in which an election is to be conducted at the time of polling. Section 6-F (1) only entitles a person to vote at the time of polling and the electoral roll is final so far as the Polling Officer or the Returning Officer is concerned but it is not final, to my mind, so far as the Election Tribunal is concerned. An examination of the various clauses of section 6-F irresistibly leads to this conclusion. Section 13-E of the U. P. Municipalities Act runs as follows:

"13-E. Right to vote-(1). No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any ward shall be entitled to vote in that ward.

(2) No person shall vote at an election in any ward if he is subject to any of the disqualifications referred to in section 12-D.

(3) No person shall vote at a general election in more than one ward and if a person votes in more than one such ward, his votes in all such wards shall be void.

(4) No person shall at any election vote in the same ward more than once, notwithstanding that his name may have been registered in the electoral roll for that ward more than once, and if he does so vote, all his votes in that ward shall be void.

(5) No person shall vote at any election if he is confined in a prison whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

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Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

It would be noticed that the provisions of section 13-E of the Municipalities Act are exactly similar to the provisions of section 6-F of the Town Areas Act and the same interpretation would have to be placed on the language of section 6-F of the Town Areas Act as on that of section 13-E of the Municipalities Act. It may be mentioned that notwithstanding the fact that section 13-E existed in the Municipalities Act, the legislature thought it necessary to enact section 19(2) (a) of the Act. If the intention of the legislature was that by virtue of the provisions of section 13-E the Election Tribunal was precluded from entering into the question of a person's right to be enrolled as a voter, they would not have thought it necessary to enact section 19(2) (a) of the Municipalities Act. It cannot be said that in view of section 13-E, the provisions of section 19(2) (a) are a mere waste of words, because it is a well accepted rule of interpretation of statutes that the legislature is deemed not to waste its words or to say anything in vain.

It has also been contended that an electoral roll is final under the provisions of rule 12 of the U. P. Town Areas (Preparation and Revision of Electoral Rolls) Order, 1953, (hereinafter referred to as the Order), and it is argued that even an Election Tribunal is precluded from questioning its finality. Rule 12 of the Order runs as follows:

"Hearing and decision of claims and objections—

(1) The Electoral Registration Officer shall hold a summary inquiry into the claim or objection preferred and shall record his decision thereon and order any addition to, omission from or alteration in the electoral roll in accordance with his decision.



For the purposes of the inquiry the electoral roll as published under para. 7 shall be presumed to be correct.

(2) The decision of the Electoral Registration Officer shall be final.

(3) A list of claims and objections shall be maintained by the Electoral Registration Officer in Form II of the Schedule."

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In my opinion there is nothing in this rule which makes the election register final even as against the Election Tribunal. Rule 9 of the Order provides for objections being filed to the entries in the electoral roll. Rule 10 provides for the manner in which the objection shall be filed and as to what will be the contents of the objection. Rule 11 provides for notice being issued in connection with objections and rule 12 deals with the hearing and decision of the claims and objections. What is final in rule 12 is the decision of the Electoral Registration Officer with regard to an objection. In other words, if he finds that the name of a particular person should be entered, it shall be so entered in the electoral roll. Only to that extent is his decision final.

The learned counsel for the petitioner has placed reliance upon the English case of *Stowe v. Jolliffe* (1) and has submitted that the section which came up for interpretation before the English Court was similar to section 6-F of the Town Areas Act, and while interpreting it the English Court held that the electoral roll, (or the register as it is called there), is conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament. It was also contended that that decision has been noticed by the Supreme Court in the case of *Durga Shankar v. Raghuraj Singh* (2) and their Lordships of the Supreme

(1) (1874) L.R. 9 C.P. 734.

(2) A. I. R. 1954 S. C. 520.

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Court have said that that case clearly lays down the law on the subject in England. I have examined that case with great care. The circumstances and the law under which that decision was given are quite different from the circumstances and the law in our case. It was contended that the 7th section of the Ballot Act, 1872, (35 & 36 Vict. c. 33), (hereinafter referred to as the English Act), is very similar to section 6-F of the U. P. Town Areas Act. Section 7 of the English Act runs as follows:

"At any election for a county or borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote:

Provided that nothing in this section shall entitle any person to vote who is prohibited from voting by any statute, or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting."

It is submitted that section 7 of the English Act and sub-sections (1) and (2) of section 6-F of the U. P. Town Areas Act, (which I have already quoted in an earlier part of this judgment), are very similar and, therefore, the decision of the English Court in *Stowe's* case (1) mentioned above must be followed in this Court. But, a full reading of the report of the English case shows that the decision is not based only on an interpretation of section 7 of the English Act but also on an interpretation of section 79 of the Registration Act, 6 and 7 Vict. c. 18, which existed from before and was allowed to continue in the Ballot Act after deleting the provisos to that section. (79), and also on the history of legislation. Section 79 of the Registration Act, after deleting the provisos, runs as follows:

"At every future election for a member or members to serve in Parliament for any county, city, or

(1) (1874) L.R. 9 C.P. 734.

borough, the register of voters so made as aforesaid shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at such election."

The argument advanced at the English bar was, to quote the learned Judges from the report of the case mentioned above, as follows:

"The effect of the Ballot Act, it was contended, was, by repealing the 98th section of the Registration Act and the 60th section of the Reform Act, to remove from the Statute Book the provisions which made the register conclusive; and the 79th section, as it applied only when it was first enacted to the procedure at elections and affected only the returning officer, so such was its only effect now; and the 7th section of the Ballot Act is to be read, in the same manner, as applying only to procedure at elections, and by its proviso practically leaving open the inquiry into any voter's vote, which, although it may be on the register, is capable of being impeached on any legal ground."

Lord Chief Justice, COLERIDGE, while dealing with this argument, observed as follows:

"The argument is ingenious, but, I think, untenable. From the Reform Act to the Ballot Act, the tendency of legislation has been to make, with certain exceptions, the register conclusive. There is nothing in the words 'at' or 'in' 'any election' (for, both prepositions are used), to limit the enactments to the time of polling only; and, although it is true that the 58th and 60th sections of the Reform Act and the 98th section of the Registration Act have been repealed, the enacting part of the

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79th section of the Registration Act has been carefully kept in force; which is the more remarkable, because the provisos to that section which insist on the retention of certain incidents of the qualification up to the time of voting are expressly repealed.

"No answer has been given to the question, and probably no answer could be given to it, what effect is to be ascribed to this 79th section of the Registration Act, beyond and other than the 7th section of the Ballot Act, if both these sections have to do with procedure only. The retention of the earlier section would be only conclusive on the returning officer.

"I think the true construction of these sections, which alone remain, is, to make the register conclusive not only on the returning officer, but also on any tribunal which has to inquire into elections, except in the case of persons ascertained by the proviso. These are persons prohibited from voting by any statute or by the common law of Parliament."

It would, therefore, be noticed that the English case is based upon the interpretation not only of section 7 of the Ballot Act but also section 79 of the Registration Act. Lord Chief Justice, COLERIDGE, held that because of the retention of section 79 it could not be held that the 7th section of the Ballot Act makes the register only conclusive on the returning officer. In the U. P. Town Areas Act there is no section analogous to section 79 of the Registration Act. We have only one section i.e., section 6-F of the U. P. Town Areas Act. In the absence of a provision in the U. P. Town Areas Act similar to section 79 of the Registration Act, I do not see how it can be said that the English case is a direct authority on the facts of our case. Lord Chief Justice, COLERIDGE,

also held that the register of voters was final on the ground that, from the Reform Act to the Ballot Act, the tendency of legislation has been to make the register conclusive. There is no such legislative history in our case and, in my opinion, the English case is quite distinguishable and can have no application to the facts of the case before us.

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Learned counsel for the petitioner has placed reliance upon the case of *Mahadeo v. Bisan* (1). In that case an application for a writ of *mandamus* and other reliefs was made by persons who had been defeated in an election held to the Corporation of the City of Nagpur. It appears that in that case no election petition was filed and a writ was moved in the Nagpur High Court praying for a declaration that the election in question was not in accordance with law, having been held on erroneous electoral roll, and for prohibiting the State Government from notifying the names of the respondents in the case as councillors under section 16 of the City of Nagpur Corporation Act, and further for restraining the respondents from taking part in the selection of six councillors. The learned Judges held that the provisions of the City of Nagpur Corporation Act made the electoral roll conclusive on the point of the right of a voter to vote in any particular ward or Constituency. First of all, that case was decided on the provisions of the City of Nagpur Corporation Act and it has not been shown to us that the provisions of that Act are similar to the provisions of the U. P. Town Areas Act. Secondly, there the question was not as to whether an Election Tribunal had the power to go into the question as to whether a particular person was rightly or wrongly enrolled as a voter. We are here concerned with the interpretation of rule 48 of the Rules and that case is no guide in deciding the question before us.

(1) A. I. R. 1953 Nag. 166.

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The next case on which the learned counsel for the petitioner placed reliance is that of *Vithaldas v. Sadanand* (1). In this case the learned Judges followed the earlier case, i.e., the one mentioned above. This case also cannot help us in interpreting the language of rule 48 of the Rules as also the other provisions of the U. P. Town Areas Act.

The learned counsel for the petitioner has also placed reliance upon para. 544, page 302, Vol. 14 of Halsbury's Laws of England, (Simon's Edition). It is not necessary to reproduce that paragraph here because that paragraph deals with the law in England and can be no guide in interpreting rule 48 of the Rules. It may also be noticed that that paragraph is based upon the decision of the case *Stowe v. Jolliffe* (2) which I have already discussed above. In my opinion the present case has got to be decided on the provisions of the U. P. Town Areas Act and especially on the language of rule 48 of the Rules.

It has also been contended that clause (13) of section 2 of the U. P. Town Areas Act defines an 'elector' as follows:

" 'elector', in relation to a ward, means a person whose name is for the time being entered in the electoral roll of that ward."

Rule 5 of the Uttar Pradesh Town Areas (Conduct of Election of Chairman) Rules, 1953, reads as follows:

"Electors for election of Chairman—The electors in a Town Area shall for the purpose of election of the Chairman, be the electors entered in the electoral rolls of the wards of that Town Area and it shall not be necessary to prepare or revise separately the electoral rolls for the election of the Chairman."

(1) A.I.R. 1957 Nag. 63.

(2) (1874) L. R. 9 C. P. 734.

It is contended that for the purpose of election of the Chairman the persons whose names are for the time being entered in the electoral roll will be deemed to be the electors. It is contended that reading these provisions with section 6-F of the U. P. Town Areas Act, it is clear that if a person's name is entered in the electoral roll, he has got a right to vote. It is not disputed that he has got such a right. The question is that even though the inclusion of the name of a person in the electoral roll may be conclusive against the polling officer and the person so named has got a right to vote, does it justify the conclusion that the tribunal cannot go into the question whether or not the name of that person was correctly entered in the electoral roll? In my opinion there is nothing in the U. P. Town Areas Act or rule 48 of the Rules, which takes away from the tribunal the power to decide that question.

It has been argued on behalf of the petitioner that there is a difference between "unqualification", (or want of qualification), and "disqualification", and it is contended that even though a person may not be qualified to be enrolled as an elector, if his name is entered in the electoral roll, he has got a right to vote and that right cannot be questioned even before an Election Tribunal, but if that person incurs a disqualification he has got no right to vote and if he has no right to vote the Election Tribunal can go into that question. It is true that there is a difference between "unqualification" and "disqualification". The provisions of sections 12-B to 12-H of the U. P. Municipalities Act have been made applicable to Town Areas. Section 12-C of the U. P. Municipalities Act runs as follows:

"12-C. Subject to the provisions of section 12-D, every person who is qualified to be registered in the Assembly electoral roll relatable to the area comprised in the ward or whose name is entered

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therein shall be entitled to be registered in the electoral roll of the ward."

Section 12-D of the same Act is:

"12-D. (1) A person shall be disqualified for registration in an electoral roll if he is disqualified for registration in the Assembly rolls.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll of the ward in which it is included:

Provided that the name of any person struck off the electoral roll of a ward by reason of disqualification under sub-section (1) shall forthwith be reinstated in that roll if such disqualification is, during the period such roll is in force, removed under the provisions of this Act, or under any other law authorising such removal."

Inasmuch as there is a reference under section 12-C of the U. P. Municipalities Act to the Assembly electoral roll it is necessary to examine the provisions of section 19 of the Representation of the People Act, 1950, (XLIII of 1950), which deals with the conditions of registration or, in other words, the qualifications for being registered as a voter. Section 19 says:

"Condition of registration—Subject to the foregoing provisions of this Part, every person who—

(a) has been ordinarily resident in a constituency for not less than 180 days during the qualifying period, and

(b) was not less than 21 years of age on the qualifying date, shall be entitled to be registered in the electoral roll for that constituency."



Section 16 of the Representation of the People Act deals with disqualifications. It runs as follows:

"Disqualifications for registration in an electoral roll—(1) A person shall be disqualified for registration in an electoral roll if he—

- (a) is not a citizen of India; or
- (b) is of unsound mind and stands so declared by a competent court; or
- (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt and illegal practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:

Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause (c) of sub-section (1) shall forthwith be reinstated in that roll if such disqualification is, during the period such roll is in force, removed under any law authorising such removal."

In the Representation of the People Act, conditions of registration or qualifications to be enrolled as an elector have been separately treated from disqualifications. To my mind want of qualification or unqualification is distinctly different from disqualification. As the provisions of sections 16 and 19 of the Representation of the People Act apply to Town Areas also, it must be held that there is a difference between disqualification and want of qualification in the law relating to the elections in a Town Area also.

The learned counsel for the respondents relied upon the case of *Prabhakar Yajnik v. The District Magistrate*,

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*Bulandshahr* (1), and the following passage has been cited before us:

"The conclusion which I have reached, although not without some hesitation, is that in section 12-D of the Municipalities Act the word 'disqualified' is used as meaning the opposite to 'qualified', that is as meaning 'not qualified'."

On the basis of this case it is contended that there being no difference between disqualification and want of qualification, if it is open to an Election Tribunal to investigate as to whether or not a person who has voted was disqualified from voting, it was equally open to the tribunal to decide whether or not he was qualified at all to be enrolled as an elector. With the greatest respect, I am unable to agree with the decision mentioned above because I have already held that want of qualification or "unqualification" is quite distinct from "disqualification". The result of unqualification or want of qualification is that a person cannot at all be enrolled as a voter, but the result of a disqualification is that though he is entitled to be recorded as a voter, his name is liable to be struck off on any of the grounds on which he can be disqualified under the law. It is not possible to support the judgment of the Election Tribunal on the basis of this decision. But as I have said above I am of the opinion that the language of rule 48 of the Rules is wide enough to entitle an Election Tribunal to decide whether or not a particular person was correctly enrolled as a voter. For these reasons I hold that the decision of the Election Tribunal is correct and does not require any interference. •

I would, therefore, dismiss the petition with costs.

BY THE COURT—We allow this petition and direct that a writ of *certiorari* shall issue quashing the order

of the Election Tribunal, opposite-party No. 1, dated the 29th April, 1958.

The Tribunal shall now proceed to decide the election petition according to law.

*Application allowed.*

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## SUPREME COURT

### APPELLATE CRIMINAL

*Before the Hon'ble Sudhi Ranjan Das, Chief Justice,  
Mr. Justice Bhagwati, Mr. Justice Sinha, Mr.  
Justice Rao and Mr. Justice Wanchoo*

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### DISTRICT BOARD, MUZAFFARNAGAR

[ON APPEAL FROM THE HIGH COURT AT  
ALLAHABAD]

**U. P. Town Areas Act, 1914,** (as amended), s. 26(a)—*United Provinces District Boards Act, 1922, s. 174(1) (k)—Powers co-extensive—Regulation—Power to issue licence—Powers over smaller area—Overrides larger area.*

S. 26(a) of the United Provinces Town Areas Act, 1914, as amended by 1934 Act, is co-extensive with s. 174(1) (k) of the United Provinces District Boards Act, 1922, so far as regulation of offensive trades or callings is concerned and as such a Town Area Committee has power to regulate offensive callings or trades and has power to frame bye-laws requiring taking out of licences.

When there is a body dealing with a larger area and from that area is carved out a smaller area which is entrusted to another body, the law-giving power to the body governing the smaller area prevails over the law-giving power to the body governing the larger area and as such the power of the Town Area Committee must prevail over the power of the District Board.

Case-law discussed.

Criminal Appeal No. 119 of 1956 from the judgment and order dated the 11th May, 1956, of the Allahabad High Court in Criminal Revision No. 1724 of 1955

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against the order, dated the 13th July, 1955, of the Additional District Magistrate (j) Muzaffarnagar in Revision No. 17/18 of 1955.

The facts appear in the judgment.

*Rameshwar Nath* and *S. N. Andley*, Advocates for the appellant.

*C. K. Daphtary*, Solicitor General of India, (*P. C. Agarwal*, Advocate with him), for the respondent.

The following judgment of the Court was delivered by—

WANCHOO, J.:—This appeal on a certificate granted by the Allahabad High Court raises a question relating to the interpretation of certain provisions of the U. P. District Boards Act, (U. P. X of 1922), and the U. P. Town Areas Act, (U. P. II of 1914). It is necessary to state the facts on which the question has arisen. Asa Ram appellant runs certain machines with the aid of power in premises which are in a locality which is admittedly within the Jalalabad Town Area since the year 1953-54. He did not take out a licence for running these machines for 1953-54, as required by bye-law (7) of the Muzaffarnagar Factories Bye-laws, framed by the District Board of Muzaffarnagar, under section 174(1)(k), read with section 106 of the District Boards Act. Consequently, he was prosecuted for contravening the bye-laws in question. He admitted that he was running these machines with the aid of power; but his contention was that as the premises where the machines were running were in the Town Area of Jalalabad, the bye-laws framed by the District Board did not apply to him and it was not necessary for him to take out a licence, and his prosecution at the instance of the District Board for contravening the bye-laws was bad. The decision of this point depended upon the construction of section 93(3) of the District Boards Act and section 26 of the Town Areas Act.

The trial Magistrate was of the opinion, on a construction of the sections above-named, that the bye-laws framed by the District Board were not applicable to premises within the Jalalabad Town Area, and, therefore, Asa Ram need not have taken out a licence. He consequently acquitted Asa Ram. There was a revision application by the District Board, which was dismissed by the Additional District Magistrate (Judicial), Muzaffarnagar, who agreed with the view of the Magistrate. The District Board then went up in revision to the High Court of Allahabad. The revision was heard by a learned Single Judge, who framed three questions, which arose for determination, namely;

(1) Is running of a flour mill, etc., an offensive trade ?

(2) Does the word 'regulation' used in section 26 (a), U. P. Town Areas Act include the power of issuing a licence ? and

(3) Does section 93(3) of the District Boards Act amount to a divestment of authority of the District Board in favour of the Town Area Committee ?

On the first question, the learned Judge was of the opinion that the machines run by Asa Ram would come within the provisions of section 26(a) of the Town Areas Act, though he also took the view that it was not necessary for him to decide the point. On the second question, he held that 'regulation' did not include the power of granting a licence, though this was against a Division Bench authority of that High Court reported as *Municipal Board, Hathras v. Bohrey Narain Dutt* (1). He relied on a decision of this Court in *Mohammad Yasin v. The Town Area Committee, Jalalabad* (2) also in this connection. On the third question he was of the view that section 93(3) barred the District Board from exercising any authority in a

(1) A.I.R. 1948 All. 1.

(2) 1952 S.C.R. 572.

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Town Area which is vested in the body mentioned in it. He was further of the view that the amendment of the Town Areas Act in 1934, by which the word 'Panchayat' occurring in the Town Areas Act was substituted throughout by the word 'Committee', made no difference, even though section 93(3) of the District Boards Act was not simultaneously amended by substituting the word 'Town Area Committee' for the word 'Town Panchayat' therein in conformity with the change made in the Town Areas Act. But in view of his decision on the second question, viz., that 'regulation' did not include the power of granting a licence, he held that bye-laws framed by the District Board for taking out licences applied to premises within the Town Areas. He, therefore, set aside the acquittal and ordered a retrial. He also gave leave to appeal to this Court.

The three points formulated by the High Court arise for decision before us also. The learned Solicitor General appearing for the District Board does not challenge the correctness of the decision on the first point, namely, whether the running of the machines which the appellant is running would come within the relevant words of section 26(a) of the Town Areas Act. It is enough in this connection to set out the two provisions in the two Acts to see that the decision is correct. Section 174(1)(k) of the District Boards Act, under which the bye-laws were framed, is in these terms—

"regulating slaughter houses and offensive, dangerous or obnoxious trades, callings, or practices and prescribing fees to defray the expenditure incurred by a board for this purpose."

Section 26 (a) of the Town Areas Act is in these terms—

"The Committee may by general or special order in writing provide and if so advised by the District

Magistrate shall provide for all or any of the following matters within the Town Area, namely—

(a) the regulation of offensive callings or trades ;

. . . . .”

It is obvious, therefore, that section 26(a) of the Town Areas Act is co-extensive with section 174(1)(k) of the District Boards Act, so far as regulation of offensive trades or callings is concerned. As the learned Solicitor General does not contest the finding of the High Court that the trades in question carried on by Asa Ram with his machines with the aid of power are offensive trades, it follows that the Town Area Committee has power to regulate these trades as well as the District Board.

So far as the second point is concerned, the learned Solicitor General concedes that ‘regulation’ would include the power of issuing a licence—and very rightly so. No case has been brought to our notice in which this Court held that power of ‘regulation’ does not include the power of issuing a licence and that issue of a licence amounts to prohibition and is not a restriction on carrying on a trade or business. It is enough to point out that the District Boards Act under which these bye-laws have been framed does not specifically provide anywhere for granting of licences. Section 174(1)(k) itself speaks only of regulating offensive trades, etc., and has not given in so many words power to issue licences. It is true that section 106 provides that the Board may charge a fee to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under the Act; but that section merely provides for levying of fee where a licence is necessary under other provisions of the Act and is not in itself an authority for issue of licences. Therefore, when the Board framed a bye-law relating to issue of licences, it did so under its power of regulation. The High Court,

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with respect, seems to have misunderstood *Mohammad Yasin's* case (1). That case turned on the question whether the Town Area Committee could impose a fee and did not deal with the question whether it could issue a licence. It was in that connection that the following sentence which the High Court has picked out, Wanchoo, J. appeared in that judgment—

“We have not been referred to any notification whereby section 294 of the U. P. Municipalities Act was extended to the respondent committee.”

Section 294 of the Municipalities Act is in the same terms as section 106 of the District Boards Act and deals with the power of levying fees. The High Court seems to have lost sight of the distinction between granting licences which depends on the power of regulation and levying of licence-fees, which can only be levied if there is specific provision to that effect in the law. *Mohammad Yasin's* case (1) decided that as there was no provision authorising a Town Area Committee to levy licence fee, it could not do so. That, however, did not mean that ‘regulation’ did not include the power of issuing licences, though in the absence of a provision for charging licence fees, licences must be issued without charge, if bye-laws require the issue of a licence in order to regulate trades or callings, which a Town Area Committee can regulate under section 26(a) of the Town Areas Act. The view of the learned Judge, therefore, that the Town Area Committee could not issue a licence when framing rules regulating offensive trades or callings is not correct. The Town Area Committee would thus have the power to frame bye-laws requiring taking out of licences in case it exercises its power of regulation under section 26(a) of the Town Areas Act in the same way as a District Board has the power of framing bye-laws under section 174(1)(k), requiring those carrying

(1) 1952 S.C.R. 572.



on certain trades to take out licences. This brings us to the third question, namely, what happens when two statutory bodies have concurrent power in the same field?

The power of the District Board to frame bye-laws under section 174(1)(k) is confined to rural areas as defined in section 3(10). We understand that this section has been amended recently in 1958 and now Town Areas are to be excluded from the ambit of 'rural area'; but at the relevant time it ran as follows:

" 'Rural area' means the area of a district excluding every municipality as defined in the United Provinces Municipalities Act, 1916, and every cantonment as defined in the Cantonment Act, 1910."

Therefore, at the relevant time, the District Board would have the power to frame bye-laws even for Town Areas. In order, however, to resolve any conflict, which may arise, section 93(3) was included in the District Boards Act. It is in these terms—

"Nothing in this Act shall entitle a board to exercise within the limits of any municipality, notified area, cantonment or town area, any authority which is vested in the municipal board, notified area committee, cantonment committee, district magistrate, or town panchayat, as the case may be."

There are certain exceptions to this provision, but we are not concerned with them in the present case. The argument of the learned Solicitor General in this behalf is that the District Board will be divested of its power to frame bye-laws for regulating offensive trades and callings in town areas, if the same authority is vested in the town panchayat. He goes on that now there are no Town Panchayats having authority in town areas, for the words "Town Panchayat" appearing in the Town Areas Act have everywhere been substituted by the words "Town Area Committee". It is submitted that

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a corresponding amendment was not made in section 93(3) and, therefore, though the District Board would have no power up to 1934 to frame bye-laws for town areas relating to regulation of offensive trades or callings, which were covered by section 26(a) of the Town Areas Act, it would have that power after the amendment of 1934.

We must say that this is a very technical argument. The Town Areas Act was passed in 1914 and in the Act, as it was originally passed, the authority conferred by section 26(a) was vested in the Town Panchayat. In 1920 the U. P. Village Panchayat Act was passed creating panchayats for any village or groups of villages. It seems that it was then thought fit to change the name in the Town Areas Act to Town Area Committee to avoid confusion with the Panchayats under the Village Panchayat Act. But this in our opinion was only a formal change, for the word 'committee' in English is after all a translation more or less of the word 'panchayat' in Hindi. Therefore, when the word 'committee' was substituted in place of 'panchayat' in the Town Areas Act there was really no change of substance and the restriction on the power of the District Board under section 93(3) of the District Boards Act to deal with matters entrusted to the town areas continued in full force. In this connection, our attention was drawn to *Shrimati Hira Devi v. District Board, Shahjahanpur* (1). In that case, section 71 of the U. P. District Boards Act was amended, but no corresponding amendment was made in section 90. In that connection the following observations were made at page 1131:

"It was unfortunate that when the Legislature came to amend the old section 71 of the Act, it forgot to amend section 90 in conformity with the amendment of section 71. But this *lacuna* cannot be

(1) 1952 S.C.R. 1122.

supplied by any such liberal construction as the High Court sought to put upon the expression 'orders of any authority whose sanction is necessary'. No doubt it is the duty of the court to try to harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act."

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That case, however, related to entirely different circumstances. Here we are dealing with two statutes giving power to two statutory bodies, and if there is conflict in view of the technical submission made by the learned Solicitor General and section 93(3) cannot come to the aid of the Town Area Committee, we have still to see which Act will prevail in the circumstances. The U. P. District Boards Act deals with a larger area, in which the area constituting the town area is also included. The Town Areas Act, on the other hand, deals with a smaller area and on principle when there is a body dealing with a larger area and from that area is carved out a smaller area which is entrusted to another body, the law giving power to the body governing the smaller area should prevail over the law giving power to the body governing the larger area. If the substitution of the word 'committee' for the word 'panchayat' is merely a translation, as observed earlier, it makes no difference to the application of section 93(3) even after 1934. But if it is not treated as a mere translation and it is said that a new body was vested with powers under the Town Areas Act by the amendment of 1934, then it means that a smaller area was carved out from a larger area in 1934 and a new statutory body was created to govern it with certain powers; in those circumstances the powers given to the new statutory body in the smaller area carved out from the larger area will prevail.

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Reference in this connection may be made to two English cases, which lay down the principle how the conflict between the two statutes in similar circumstances should be resolved. In *King v. The Justices of Middlesex* (1), it was held—

“Where two Acts of Parliament, which passed during the same session and were to come into operation the same day, are repugnant to each other, that which last received the Royal assent must prevail and be considered *pro tanto* a repeal of the other.”

Again in *Daw, Clerk of the Commissioner of Sewers of the City of London v. The Metropolitan Board of Works* (2), it was held—

“Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the Legislature co-exist, the earlier must necessarily be repealed by the later statute.”

In that case the conflict was between section 145 of the City of London Sewers Act, 1848, and section 141 of the Metropolis Local Management Act, 1855, and the later was held to prevail. The principle of these cases will apply to the present circumstances, and if the words “town area committee” are not held to be a translation of the words “town panchayat”, the result is that a Town Area Committee being vested with power under section 26(a) to regulate offensive trades or callings, the power of the Town Area Committee must prevail over the power of the District Board under section 174(1)(k) of the District Boards Act. We, therefore, allow the appeal, set aside the order of the High Court and order the acquittal of Asa Ram appellant.

*Appeal allowed.*

(1) (1831) 2 B. & Ad. 818, (1831). 109 E.R. 1347, 1348.  
 (2) (1862) C. P. 12 C. B. N. S. 161. (1862) 133 R. R. 311.

## CRIMINAL REVISION

Before Mr. Justice Srivastava and  
Mr. Justice Verma

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**Indian Penal Code, 1860, s. 411—Ingredients, proof of—Indian Evidence Act, 1872, s. 114—Presumption, effect of.**

The applicants were convicted under s. 411, Indian Penal Code, on proof of two facts, viz., (i) that a theft was committed in respect of the articles in question, and (ii) that the articles were recovered from the possession of the applicants soon after the theft. The applicants by petitions in revision contended that the conviction was unsustainable in that the prosecution had failed to prove a further necessary fact that some person other than the accused had possession of the incriminating articles before the accused got possession of it.

*Held*, that where it has been proved (i) that a theft had been committed in respect of certain property, and (ii) that that property has been recovered from the possession of the accused soon after the theft, a presumption arises under illustration (a) to s. 114, Indian Evidence Act, that the accused is either the thief or receiver of stolen property, and the ingredients of an offence under s. 411, Indian Penal Code, including possession of someone else at an earlier stage, would be presumed to have been established. The accused will then have to rebut the presumption raised against him.

If, however, the recovery cannot be held to have been made soon after the theft, the presumption under s. 114, Illustration (a), Indian Evidence Act, is not available to the prosecution and it will have to prove by direct evidence, along with the other ingredients of the offence, that some person other than the accused had possession of the property before the accused got possession of it.

The applicants having failed to rebut the presumption raised against them under s. 114 Illustration (a) of the Indian Evidence Act, the facts proved against them were sufficient to warrant a conviction of the applicants.

The petitions in revision were accordingly dismissed.

Case-law discussed.

Criminal Revision No. 55 of 1957, (connected with Criminal Revision No. 1573 of 1958), from an order of

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Uma Kant Verma, Sessions Judge, Fatehpur, in Appeal No. 258 of 1956, dated

The facts appear in the judgment.

*C. S. P. Singh* for the applicant.

The Assistant Government Advocate for the opposite-party.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—These two applications in criminal revision are connected with each other in the sense that the same question of law arises in them. They can, therefore, be disposed of by the same judgment.

Criminal Revision No. 55 of 1957 is on behalf of Rajauwa. He was convicted by a Magistrate, First Class, of Fatehpur under section 411, Indian Penal Code, and was sentenced to nine months' rigorous imprisonments. His conviction was upheld by the learned Sessions Judge in appeal, but he reduced the sentence to six months' rigorous imprisonment. The facts found against him by the two courts are that in the night between the 15th and 16th of July, 1956, certain ornaments, marked Exs. I to VIII in the case, were stolen from the house of Jagdeo. On the 19th of July, 1956, the house of the applicant was searched and these stolen ornaments were recovered from a room in the exclusive possession of the applicant where they were lying buried under the ground. The applicant denied the factum of recovery and did not offer any explanation as to how the stolen ornaments came to his possession.

In the other case, Criminal Revision No. 1573 of 1958, Roshan was convicted by a Magistrate, First Class, of Meerut under section 411, Indian Penal Code, and sentenced to six months' rigorous imprisonment. His conviction and sentence were both confirmed by the Sessions Judge in appeal. The facts found against him were that a theft was committed at the house of Bal Makund in the night between the 21st and 22nd of November, 1957. The thieves broke into the house

and stole a blanket, shirts and a cycle pump along with other articles. These stolen articles, viz., the blanket, shirts and cycle pump were recovered from a *kotha* in the exclusive occupation of the applicant Roshan. The *kotha* was locked and was opened by Roshan himself. The recovery was made on the 22nd of November, 1957.

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In revision the case of Rajauwa came up before MR. JUSTICE TAKRU and the case of Roshan came up before MR. JUSTICE CHATURVEDI. The only point which was raised on behalf of the two applicants before the learned Judges was that the conviction of the two applicants under section 411, I. P. C., was not justified, because one of the essential ingredients of that offence had not been established by the prosecution. It was pointed out that the only facts which the prosecution had proved in the cases of the two applicants were that a theft had been committed and that soon after the theft the stolen property had been recovered from the possession of the applicants. It was urged that in addition to these facts the prosecution was bound to prove that the stolen property had been in the possession of some other person before it had come into the possession of the applicants and if that was not proved the conviction of the applicants under section 411, I. P. C., was not justified. Reliance was placed in this connection on certain observations made by their Lordships of the Supreme Court in the case of *Trimbak v. The State of Madhya Pradesh* (1). Reference was also made to a case decided by MR. JUSTICE ASTHANA, *Ramdeo v. State* (2). Learned counsel for the State in his turn referred to the case of *Hanuman v. State* (3). MR. JUSTICE TAKRU found that there was a conflict between the two Single Judge decisions of this Court which needed to be resolved. MR. JUSTICE CHATURVEDI also

(1) A.I.R. 1954 S.C. 39.

(2) Criminal Revision no. 1142 of 1956, decided on 30th October, 1956.

(3) Criminal Revision no. 634 of 1958, decided on 27th May, 1958.

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found some difficulty in accepting the interpretation that was being suggested in respect of the decision of the Supreme Court in *Trimbak v. The State of Madhya Pradesh* (1). Both the learned Judges were of opinion that the point which was being raised was of frequent occurrence and that it was necessary that it should be decided by a larger Bench. That is how the two cases have come up before us.

The question which we have to decide, therefore, is whether it is necessary for the prosecution in order to secure a conviction under section 411, I. P. C., to prove by positive evidence, in addition to the factum of theft and the recent recovery of property from the possession of the accused, that the property was in the possession of someone else before it came into the possession of the accused.

In *Trimbak v. The State of Madhya Pradesh* (1) the facts were that a dacoity had been committed in the house of one Namdeo Moti Ram in the night of the 11th of December, 1950. The appellant Trimbak was prosecuted under section 395, Indian Penal Code, for having participated in that dacoity. The only substantial evidence that was produced against him was that on his pointing out, some property taken away by the dacoits had been recovered from an open field which was accessible to all. The learned Magistrate acquitted Trimbak on the ground that the evidence of the recovery was insufficient to prove that Trimbak was in possession of the stolen goods. The other evidence regarding his participation in the dacoity was disbelieved. Against the acquittal, the State Government preferred an appeal to the High Court. The High Court upheld the acquittal under section 395, Indian Penal Code, but convicted Trimbak under section 412, Indian Penal Code, for receiving stolen property. The view

(1) A.I.R. 1954 S.C. 39.



taken was that the stolen ornaments having been taken out of the field by Trimbak and he having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it could be presumed that he must have kept the ornaments there. Special leave for appeal was granted by the Supreme Court to Trimbak and while disposing of his appeal, MAHAJAN, J., (as he then was), pointed out that the High Court's approach to the decision of the case under section 411, Indian Penal Code, was not a correct one. He said:

"It is the duty of the prosecution in order to bring home the guilt of a person under section 411, I. P. C., to prove (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property."

It was held that in the case of Trimbak none of these essential ingredients of the offence had been proved. As the field from which the ornaments had been recovered was an open one and accessible to all and sundry, it was found to be difficult to hold positively that the accused was in possession of the articles. It was stressed that the fact of the recovery by the accused was compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery could not be regarded as conclusive proof that the accused was in possession of the articles. The learned Judge observed that on the evidence it could not be held that Trimbak was the thief and as there was no evidence that the ornaments were in the possession of someone else before the appellant got them, (even if he was held to have got them),

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he could not be held guilty of receiving the stolen property. The appeal of Trimbak was, therefore, allowed and he was acquitted under section 411, Indian Penal Code, also.

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It is stressed on behalf of the applicants that in *Trimbak's* case (1), the Supreme Court enumerated the essential ingredients of section 411, I. P. C., and the second ingredient according to their Lordships was that some person other than the accused had possession of the property before the accused got possession of it. If, therefore, the prosecution does not establish this ingredient, the accused is entitled to say that the case is not proved against him and that he should be acquitted.

While pointing out the second ingredient of section 411, I. P. C., their Lordships of the Supreme Court were only reiterating the well recognized distinction between a receiver and a thief. When the thief removes the stolen property from the possession of its owner and takes it into his own possession, he not only commits theft but is also in possession of stolen property knowing it to be stolen. He cannot, however, be convicted of both the offences. If he is the thief, he possesses the stolen property in his capacity as a thief, and not as a receiver. It has, therefore, been held that the same person cannot be convicted of theft as well as of receiving stolen property knowing it to be stolen. As is laid down in Halsbury's Laws of England, III Edition, Volume X, page 811:

"A person who is guilty of stealing goods as a principal in either the first or the second degree cannot be convicted of receiving them."

[Vide also *Harendra v. State* (2)]. If, therefore, a person is sought to be made liable as a receiver of stolen property, there must be something to show that he is not

(1) A.I.R. 1954 S.C. 39.

(2) A.I.R. 1956, All. 336.

the thief. If he is the thief, he cannot be a receiver. Before he can be held to be a receiver, it has to be shown that he received the property from another person, either the thief or someone else who was an earlier receiver.

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In *Trimbak's* case (1) however, their Lordships were not dealing with the way in which the three essential ingredients of section 411, I. P. C., were to be proved. In that case it was not necessary for them to deal with that question, because they found as a fact that it was not proved that Trimbak had been in actual possession of the stolen property.

In every case under section 411, I. P. C., two facts, viz.,

(1) that a theft was committed and certain articles were stolen, and

(2) that the stolen articles were recovered from the possession of the accused,

have to be established by direct evidence. They cannot be presumed. If these two facts are established and the recovery from the possession of the accused is a recent one, it will be open to the court to presume under illustration (a) to section 114 of the Indian Evidence Act that the accused is either the thief or a receiver of stolen property. The presumption is, however, a discretionary one and may not be available at all in certain cases, *e.g.*, where in the circumstances of the case the recovery cannot be held to have been made soon after the theft. In such cases it will be necessary for the prosecution to prove by direct evidence not only that the stolen property was in the possession of some person other than the accused before it came to his possession but also that the accused knew or had reason to believe that the property was stolen property. In a case in which the presumption under illustration (a) to section 114 of the Indian Evidence Act is available, all

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the essential ingredients of the offence including possession of someone else at an earlier stage will be presumed and it will be for the accused to rebut the presumption, to show that any of the essential ingredients of the offence is missing and to offer a reasonable explanation of his possession of the articles.

The basis of the rule enacted in illustration (a) to section 114 of the Indian Evidence Act appears to be the well established principle of common law which has been stated in Halsbury's Laws of England, III Edition, Volume 10, at page 813:

"The possession by a person of property which has been recently stolen is some evidence in the absence of a reasonable explanation by him as to how it came into his possession, that he either stole it or received it knowing it to be stolen. Whether it is evidence of larceny or of receiving depends upon the circumstances of the case. The weight of the evidence depends upon the nature of the goods and length of time which has elapsed from the time when they were stolen to the time when they are proved to have been in the possession of the accused."

Their Lordships of the Privy Council reiterated the same principle in *Otto George Gfeller v. The King* (1), when they observed:

"that upon the prosecution establishing that the accused was in possession of goods recently stolen, they may in the absence of any explanation by the accused of the way in which the goods came into his possession which might reasonably be true find him guilty, but if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not

(1) (1944) 45 Cr. L. J. 24.

convinced of its truth the prisoner was entitled to be acquitted."

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If, therefore, it is proved that a theft was committed and that soon after it was committed, the stolen property was recovered from the possession of the accused, the prosecution can without proving any additional fact request the court to presume that the accused is either the thief or the receiver of the property knowing it to be stolen.

The presumption, mentioned in illustration (a) to section 114 of the Indian Evidence Act, it will be noticed, is an alternative one. Whether in a particular case the court will presume that the accused is a thief or whether it will be presumed that the accused is a receiver of stolen property knowing it to be stolen, depends upon the facts and circumstances of each case. Generally speaking, if the recovery is very recent and there is no explanation at all as to how the accused came into possession of the stolen goods, it would be preferable to presume that he is the thief. But, keeping in view the circumstances of a particular case, there is nothing to prevent the court from presuming that the accused is a receiver of stolen property. As POOLOCK, C. B., laid down in *R. v. Langmend*, (1):

"If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except indeed where the possession is so recent that it is impossible for anyone else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from someone else. If there is no other

(1) 9 Cox. 464.

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evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence, which is consistent either with his having stolen the property, or with his having received it from someone else, it will be for the jury to say which appears to them the more probable solution."

If this presumption is drawn it will be in respect of all the essential ingredients of the offence concerned. If, for instance, the offence presumed is theft, it will be presumed and will not have to be proved that the accused removed the property from the possession of another person dishonestly. In case the presumed offence is one under section 411, I. P. C., guilty knowledge and earlier possession of another person will be presumed and will not have to be proved.

We find nothing in *Trimbak's case* (1) to support the contention of the learned counsel for the applicants that in every case under section 411, I. P. C., the prosecution must prove by positive evidence that the property, before it came in the possession of the accused, was in the possession of someone else and that the presumption referred to in illustration (a) to section 114 of the Indian Evidence Act cannot be available to the prosecution in such a case.

In the case of *Ramdeo v. State* (2), ASTHANA, J., only purported to follow *Trimbak's case* (1) and did not consider whether all the ingredients of the offence enumerated in that case could be presumed to exist in view of illustration (a) to section 114 of the Indian Evidence Act.

The view we are taking appears to be in consonance with the decision of a Division Bench of the Orissa High Court in *Sadasiv Das v. State* (3). In that case a dacoity had been committed and it had been proved

(1) A. I. R. 1954 S. C. 39.

(2) Criminal Revisions no. 1142 of 1956, decided on 30th October, 1956.

(3) A. I. R. 1958 Orr. S.

that certain properties which had been taken away, had been recovered from the possession of the appellants. The appellants had, therefore, been convicted under section 412, I. P. C. It was contended that the conviction was not justified because no evidence had been led to prove that before the properties had come into the possession of the accused they had been in the possession of someone else. Both the learned Judges repelled the contention. NARASIMHAM, C. J., observed:

"The impression that when an accused is charged with an offence under section 411, I. P. C., the prosecution must invariably establish affirmatively that the stolen property was first in the possession of some other person and then was transferred to the possession of the accused, is erroneous and is not supported by the decision in *Trimbak v. The State of Madhya Pradesh* (1).

Where the facts found justify the drawing of the presumption under illustration (a) to section 114 of the Evidence Act and a court draws such a presumption, it is obvious that the accused who was found in possession of stolen property soon after theft and who is unable to give satisfactory explanation for his possession, is either a thief or a guilty receiver, and it is not necessary for the prosecution to further show that possession was transferred to him from some other person."

P. B. RAO, J., concurred in that conclusion and laid down:

"Sections 411 and 412, I. P. C., lay down the conditions required to be proved in order to convict a person as a receiver or retainer of stolen property. But if in the process of proof the court draws a presumption under section 114, Evidence

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goods soon after the theft, has received the goods knowing them to be stolen, then the requirements of sections 411 and 412, I. P. C., are complied with and the conviction of the accused under section 411 or section 412 on the basis of such presumption cannot be held to be bad on the ground that there is no evidence that the accused received the properties recovered from them or from somebody else."

In view of what we have said above two applicants before us cannot get any advantage of the omission of the prosecution to lead direct evidence to prove that before the stolen property came into their possession it was in the possession of some other person. Against both these applicants it was well established that a theft had been committed and that the stolen property had been recovered from their possession soon after the theft. In the case of Roshan the learned Sessions Judge expressly utilized the presumption mentioned under section 114 of the Indian Evidence Act. In the other case of Rajauwa the learned Sessions Judge did not refer to the section, but was obviously drawing the presumption mentioned in it when he said that the appellant could be held to have dishonestly received or retained the property knowing or having reason to believe the same to be stolen, because he had been found in exclusive possession of the same only three days after the theft. In the circumstances that were established in the two cases the two applicants could certainly have been presumed to have been the persons who had actually committed the thefts, but the courts in their discretion raised the alternative presumption that they were guilty as receivers. We are unable to say that the discretion was not judicially exercised or that any interference is called for in that respect. The presumption having been raised, the prosecution was relieved of the neces-



sity of proving the ingredient, the absence of which is being stressed upon on behalf of the applicants. They cannot, therefore, claim an acquittal on account of absence of evidence in respect of it.

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The learned counsel for Rajauwa raised an additional point and urged that the examination of his client under section 342, Cr. P. C., was defective and that on that account his conviction stood vitiated. It is, however, now well settled that every case of omission properly to examine an accused person under section 342, Cr. P. C., is not necessarily fatal to the prosecution. Before the accused can be allowed to take any advantage of the omission, he must show that he has been prejudiced in any manner. In the present case it was not even alleged before the Sessions Judge in appeal that the applicant had been prejudiced in any manner because of his defective examination under section 342, Cr. P. C. The learned counsel has not succeeded in showing any prejudice to his client even before us. Rajauwa denied the theft as well as the recovery. His denial in respect of the recovery has been found to be false. He had no explanation to offer as to how the stolen articles came into his possession. When his defence was a complete denial and he had not set up any positive case of his own, a more detailed examination under section 342, Cr. P. C., would not have been of much use. The applicant was not prejudiced in any manner on account of the absence of such an examination.

The convictions of both the applicants, therefore, appear to us to be quite correct. The sentences do not call for any interference. The applications are, therefore, rejected. Rajauwa must surrender and serve out his sentence, if he is on bail.

*Revisions rejected.*

## CIVIL MISCELLANEOUS

Before Mr. Justice Tandon

S. N. SAGAR (APPLICANT)

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v.

STATE OF UTTAR PRADESH (OPPOSITE-PARTY)

U. P. Civil Service (Executive)—Probationer in—Status of, after expiry of probationary period—Procedure for termination of or removal from service—Constitution of India, 1950, Arts. 226 and 311—Civil Services (Classification, Control and Appeal) Rules, r. 55(3)—U. P. Civil Service (Executive Branch) Rules, 1941, r. 23(1).

The probationary period in U. P. Civil Service (Executive Branch) is two years unless it is extended expressly and for a specified period by the Governor. Wherefore, if a person appointed as a Deputy Collector substantially and in a clear vacancy serves out his probationary period, he acquires a lien on his post and cannot thereafter be treated as a probationer and the procedure for dispensing his services on that footing would be bad and render the consequential order liable to be quashed through a writ of *certiorari*.

The power of extending the period of probation cannot be exercised retrospectively after its expiry. The absence either of an increment in salary, (which in this case was due to efficiency bar), or of a specific order of confirmation would not be itself operate as an extension of the probationary period.

*Quaere*: Whether a Government servant continuing his services after crossing the probationary stage is entitled to be treated as confirmed in his post even in the absence of an express order to that effect.

*State of U. P. v Dr. Kanshi Ram Anand* (1) referred to.

Civil Miscellaneous Writ no. 1956 of 1957.

The facts appear in the judgment.

S. C. Khare and K. N. Singh for the applicant.

The Standing Counsel for the opposite-party.

TANDON, J.:—Sri S. N. Sagar, the petitioner, was appointed substantively as Deputy Collector in November, 1948, in the Provincial Civil Service of this State in one of the vacancies reserved for War Services candidates. He was on probation for two years which ex-

(1) A.I.R. 1958 All. 844.

pired on 2nd November, 1950. He continued to serve in that service until his employment was terminated in July, 1957, by the Governor acting under sub-rule (1) of rule 23 of the U. P. Civil Service (Executive Branch) Rules, 1941, read with rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules. Prior to the termination of his services, he served at different stations. In 1953 he was at Jaunpur where he was Sub-Divisional Officer of one of the tehsils. But while still at Jaunpur, complaints started against him attacking his integrity, etc. He naturally denied their truth which he claimed had been engineered by some of his subordinates who had reasons to be displeased with him for his having punished them. From Jaunpur the petitioner was transferred to Faizabad where on 13th April, 1953 he was served with a charge-sheet levelling a number of charges against him and also asking him to show cause why his probation should not be terminated. Later in January, 1955, after considering the explanation submitted by the petitioner on the said charges, the Government decided that—

“he be warned to be correct in his conduct and guard his reputation and that his case be re-examined six months hence”.

This was communicated to the petitioner in March, 1955. At the same time the Government directed the Commissioner, Allahabad Division, to report to it on the petitioner's conduct and integrity in July, 1955. On 18th September, 1956, Deputy Secretary to State Government again served a number of charges on the petitioner. They included that he had obtained from his subordinates rations and other commodities without making any payment for the same, that he had claimed and actually obtained money through false and incorrect travelling allowance bills, that his judicial work was highly unsatisfactory, that he was friendly with one

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Jagdamba Singh and was also under the influence of his orderly which earned him a bad name and an unwholesome reputation for integrity, and that his work was of a poor quality. The charge-sheet further asked him to show cause why his probation should not be terminated. The petitioner submitted his reply on 16th October, 1956, and, as usual, he refuted the several allegations against him, but he also urged that should the Government still decide to continue the proceedings against him, he might be given an opportunity to cross-examine the witnesses who had deposed against him and to put forward his defence also. He further requested that he be given a personal hearing. Admittedly he was not allowed any such opportunity, but on 24th July, 1957, the Deputy Secretary to Government informed him through the District Magistrate that his employment had been terminated. Relevant extract from this order is given below:

"With reference to your (District Magistrate, Fatehpur) letter no.18/ST, dated October 26, 1956, forwarding the explanation of Sri Surendra Nath Sagar, probationary Deputy Collector, Fatehpur, why his probation should not be terminated on the charges contained in G. O. No. 4849/II-A—853-50, dated September 18, 1956, I am directed to say that after duly considering the explanation of Sri Sagar the Government has decided under rule 23(1) of the U. P. Civil Service (Executive Branch) Rules, 1941, read with rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules, to terminate the employment of Sri Sagar as a probationary Deputy Collector with effect from the date of service of this order on him."

As a consequence, the petitioner's services were terminated. Two facts are very pertinent about it, firstly, that in terminating his services, the State Government held

the petitioner to be a probationary Deputy Collector on 24th July, 1957, and, secondly, that termination was effected under rule 23(1) of the U. P. Civil Services (Executive Branch) Rules, 1941, read with rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules. Petitioner's case in this connection, is that his period of probation, which was two years from 3rd November, 1948, ended on 2nd November, 1950, and that from 3rd November, 1950, onwards he was a confirmed Deputy Collector, therefore, neither rule 23(1), nor rule 55(3) aforesaid was available against him.

He is further impugning the *vires* of the said order on the ground that it contravened Article 311 of the Constitution, because he was a confirmed Deputy Collector and the impugned order was, therefore, an order of removal from service within its meaning; it could not be imposed except after giving him an opportunity to show cause against the proposed action, as was not done. Alternatively, his contention is that even if he is not held to be a confirmed Deputy Collector and was on probation, sub-rule (3) of rule 55 of the Civil Services (Classification, Control and Appeal) Rules, which applied, requires that where it is proposed to terminate the employment of a probationer for any specific fault or on account of his unsuitability for the service, he will be apprised of the grounds of such proposal, given an opportunity to show cause against the action to be taken against him and his explanation in that behalf, if any, shall be duly considered before orders are passed by the competent authority.

Some of the points, which may need to be determined in this case, therefore, are (1) whether the petitioner's termination of employment was for any specific fault or on account of his unsuitability for service, and (2) whether he was still on probation on the date his services were terminated or (3) was he a confirmed Deputy Collector.

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In connection with the first point it may be relevant to refer to, (i) Annexure A, dated 30th April, 1954, by which certain charges were forwarded to the petitioner, blaming him of misconduct and unsuitability; (ii) Annexure B, by which the Governor after considering his explanation on Annexure A directed his case to be considered once again after July, 1955; (iii) Annexure C, by which the Governor once again served a number of charges upon him accusing him of misconduct and unsuitability for service; and (iv) lastly Annexure D, by which his services were terminated. Both in Annexure A and in Annexure C, the petitioner was further asked to show cause why his probation should not be terminated. There is reference in Annexure D to Annexure C and it also is stated therein that the Governor had after considering petitioner's explanation on the charges contained in Annexure C decided to terminate his employment. These documents abundantly show that the petitioner's services were terminated in pursuance of the charges communicated to him and these charges in effect amounted to accusing him of unsuitability for service. The contention urged by the learned Standing Counsel that the termination of employment was not for any fault or unsuitability for service but in the right of the Governor to terminate it otherwise at his pleasure does not appear to be well found. The reference in Annexure D to sub-rule (3) of rule 55 of the Civil services (Classification, Control and Appeal) Rules, which deals with the case of probationers fully confirmed that the termination was effected in that situation.

Sub-rule (3) of rule 55 of the Civil Services (Classification, Control and Appeal) Rules is as follows:

"This rule shall also not apply where it is proposed to terminate the employment of a probationer whether during or at the end of the period of

probation, or to dismiss, remove or reduce in rank a temporary government servant, for any specific fault or on account of his unsuitability for the service. In such cases, the probationer or temporary government servant concerned shall be apprised of the ground of such proposal, given an opportunity to show cause against the action to be taken against him, and his explanation in this behalf, if any, shall be duly considered before orders are passed by the competent authority.

Its closing sentence has required the competent authority, who is the Governor in this case, to apprise the probationer concerned of the grounds on which it is proposed to terminate his employment, which give him an opportunity also to show cause against them. He must consider his explanation also. Indeed, it was due to the aforementioned provision that charges were served upon the petitioner and he was also asked to show cause why he should not be removed. In view of these facts the true position was, and there is no counter suggestion against it by the respondents also, that the petitioner's appointment was terminated on account of the faults communicated to him in the charge-sheet and for his unsuitability for the service.

But before the question whether there was due compliance of sub-rule (3) of rule 55 aforesaid is examined, it will be necessary to hold that the petitioner was still a probationer in July, 1957, that is, when his services were terminated, or had he, as claimed by him, acquired a confirmed status. The following rules in the United Provinces Civil Service (Executive Branch) Rules, 1941, may be referred in this connection. Rule 22 is:

"All officers on appointment will be placed on probation. The period of probation in the case of officers directly recruited will be two years, and in

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the case of officers appointed by promotion will be one year. During the period of probation all officers will be required to pass the departmental examinations, and to undergo such training as the Governor may from time to time prescribe."

Rule 23 is:

"(1) If it appears at any time during or at the end of the period of probation that an officer has not made sufficient use of his opportunities, or if he has otherwise failed to give satisfaction, he may, if directly recruited, be removed from the service, or, if appointed by promotion, reverted to the post from which he was promoted:

Provided that the Governor may extend the period of probation. Any such extension shall specify the exact date up to which the extension is granted.

(2) An officer removed from the service during or at the end of the period of probation under sub-rule (1) will not be entitled to any compensation."

And Rule 24 is:

"A probationer will be confirmed in his appointment at the end of his period of probation if—

(i) he has passed the departmental examination completely, and

(ii) the Commissioner reports that he is fit for confirmation and that his integrity is unquestionable."

Reference may be necessary to clause (c) of rule 25 also relating to pay which is:

"25. The scale of pay admissible to a member of the service appointed or approved for appointment—

(a) .....

(b) .....



(c) On or after April 1, 1947, on the results of a competitive examination or by direct nomination according to the rules previously in force, shall be Rs.250—25—400—30—700—50—850 with efficiency bars at Rs.400 and Rs.700.

"Such an officer will draw a pay of Rs.300 per mensem during the first year of his probation and Rs.325 per mensem when he has completed one year of service and has also passed Part I of the departmental examination, and subsequent increments as they accrue:

Provided that if the period of probation is extended on account of failure to give satisfaction, such extension shall not count for increment unless the appointing authority directs otherwise."

Just here, it also may be mentioned that though the time-scale for the service fixed initial salary at Rs.250, the petitioner was given a starting salary of Rs.325. This was done as he happened to be a war service candidate and a modification had been made in their case. The Government again revised the initial pay of certain war service candidates and as a result the petitioner was given a starting salary of Rs.375. And after completion of one year of probation and having passed Part I of the Departmental Examination, he was awarded one increment raising his salary to Rs.400. No further increments were allowed to him thereafter. For this one explanation can be that the time-scale applicable to him provided an efficiency bar at that stage, which admittedly he was not allowed to cross. It has been found necessary to refer to this feature as the stoppage of the petitioner at the stage of Rs.400 cannot by itself necessarily mean that he stayed at that stage because his probation continued or had not ended. In the absence of other evidence showing that the period of

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probation was actually extended, its extension could not be deduced from the above circumstance.

It is common ground that the petitioner was appointed substantively in a clear vacancy but had been placed on two years' probation. There were certain vacancies reserved for war service candidates and he was appointed in one of them. Under rule 22 of the U. P. Civil Services Executive Branch Rules, direct recruits, which Sri Sagar was, were required to be placed on probation for two years. His period of probation which was two years was thus fixed under this provision. The same rule required that he shall during his period of probation pass the Departmental Examination and also undergo such training as might from time to time be prescribed. Under rule 25 a probationer is entitled to an increment after one year of probation provided he has passed Part I of the Departmental Examination. This was allowed to the petitioner, who passed Part I during this period raising his salary to Rs.400. After this he was not allowed any increments and this might well have been due to the fact that he never crossed the efficiency bar.

Rule 23 provides that if it appears at any time during or at the end of the probation that an officer has not made sufficient use of his opportunities or has failed to give satisfaction otherwise, he can be removed from service. It also gives power to the Governor to extend the period of probation but any extension granted shall specify the exact date up to which it is done. The rule thus lays down, firstly, that the period of probation shall be two years, secondly, that it can be extended but the order granting extension must specify the date up to which it is done, and thirdly, that should it appear at any time during or at the end of the probation that the officer has not made sufficient use of his opportunities, etc. he can be removed. The period of

probation, which is a period of trial, is thus a fixed period and though it can be extended in appropriate cases, it has nevertheless to be a fixed period and not continue indefinitely. The provision in rule 23 that any extension which is granted shall specify the date up to which it is done, clearly showed that an extension in the period of probation does not take place except by a written order which should further contain the date up to which this is done.

The question may also arise whether an extension in the probation period can be effected even though the original period has expired or is it that it must be ordered within that period. The rule itself is silent on this point. The learned Standing Counsel has contended that in the absence of any prohibition against so doing, the Governor has the power to extend it even subsequently. The period of probation of a Government servant is attended with certain obligations which bind a Government servant. During that period he has no claim or lien. Even where his appointment is in a substantive vacancy but if he is placed on probation, he is on trial and his employment is during the period of probation liable to be determined without necessarily going through the process of an enquiry under rule 55 (1) of the Civil Services (Classification, Control and Appeal) Rules or under Article 311 of the Constitution. But this obligation lasts during the probation period only. Once the trial period is over that obligation ceases, at the same time he acquires certain vested rights. One obvious effect of letting the period of probation to be extended even subsequently with retrospective operation would thus be to divest the Government servant concerned of certain rights already accrued in his favour. In the above view of the matter, the power to extend the period of probation contained in rule 23 will not entitle the Governor to extend it after the ori-

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ginal period has expired. Unless the rule has expressly provided that any particular power conferred by it shall be exercisable with retrospective effect also, the power can be used prospectively only whenever it will have the effect of divesting any rights already accrued.

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Sri Sagar was placed on probation for two years on 3rd November, 1948, which period he completed on 2nd November, 1950. Admittedly, an order extending the above period was not made during its currency, nor even at its end. On the other hand, he continues to work as a Deputy Collector even subsequently at Jaunpur and at other places. Though on his transfer from Jaunpur he was delivered a charge-sheet on 13th April, 1954, detailing several acts of misconduct on his part, on this occasion, too, he was not informed, nor any order made, that his period of probation had been extended. He was merely asked to show cause why his probation should not be terminated. This order simply ended by a warning to the petitioner and directed his conduct to be watched for some time. No order was made on this occasion either extending the period of probation. This was in January, 1955. In September, 1956, he was served afresh with a charge-sheet, which ultimately resulted in the termination of his employment in 1957. It was for the first time on 2nd August, 1956, that an order was made, vide Annexure I to the counter-affidavit, extending the period of probation till 31st August, 1956. This was for more than five years after the original period of probation had expired. The learned Standing Counsel does not claim that any extension order was made in the interval, though I asked him to produce the material, if any, to show that an extension was made during that period.

There was thus no order enlarging the period of probation made, prior to 2nd August, 1956. By the order of 2nd August, 1956 an extension was ordered for the

first time till 31st August, 1956, which, too, expired on 31st August, 1956. The benefit of this extension can, if at all, be had only if the respondents can successfully prove that despite there being no order of extension made in the meantime, the probationary period continued throughout. In September, 1956, when a fresh charge-sheet was served upon the petitioner asking him to show cause why his services as probationer should not be terminated, even the extension granted till 31st August, 1956, had come to an end. It might be urged that the above charge-sheet was issued very soon after 31st August, 1956, and in that condition it could be said to be action taken "at the end of the period of probation" within the meaning of rule 23 of the U. P. Civil Services (Executive Branch) Rules, therefore, was fortified by the power conferred by that rule. Whether it will or will not be so *vis-a-vis* the extension ordered on 2nd August, 1956, up to 31st August, 1956, may not be necessary to be decided in this case; because the respondents cannot succeed in that contention unless it is further established that the extension sought to be effected on 2nd August, 1956, had not only the effect of enlarging the period up to 31st August, 1956, but had the effect further of including the interval of five years and ten months between 3rd November, 1950, and 2nd August, 1956, within the period of probation. In other words, the order of 2nd August, 1956, retrospectively extended the period of probation up to the date of its making, it being no party's case that fresh probation can be imposed.

As already noticed, there was no order during this interval of nearly six years that the period of probation, which expired on 2nd November, 1950, had been extended. It cannot be inferred from the fact either that the petitioner had been stopped at the stage of Rs.400, which also happened to be the stage of an efficiency bar. If

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at all, an inference from this latter fact can be that the petitioner had been stopped because he was not considered efficient to cross over the bar but not that he had failed in his trial for suitability for the service. Again, when a charge-sheet was served upon him in 1954 and he was also threatened with an action to terminate his period of probation, no order was made either before or at the time of issuing this charge-sheet or even subsequently enlarging the period of probation. On the contrary, his conduct was directed to be watched till July, 1955. Even at the expiry of this period nothing appeared to have been done in the matter of extending the period of probation. The proviso under rule 23 of the U. P. Civil Services (Executive Branch) Rules has contemplated that an extension in the period of probation shall be effected by an order which will specify the date also up to which it is extended. Despite this rule, no action as required by it was taken. The respondents apparently thought that notwithstanding the expiry of the period originally fixed as the period of probation, the same continued even subsequently, which clearly is not warranted by rule 23. It, on the contrary, has insisted on a specific order with the date incorporated in it up to which the probation of a member of the service is extended. The reference in the charge-sheet of 1954 to termination of the petitioner's employment as probationer will not improve the situation, which has to be assessed in terms of rule 23. I am, therefore, of the opinion that since there was no order extending the period of probation made either during the period of two years, which expired on 2nd November, 1950, nor until five years and ten months after this date, the probationary period of the petitioner came to an end on 2nd November, 1950.

The respondents have referred to rule 24 of the U. P. Civil Services (Executive Branch) Rules (already quoted earlier) and urged that by providing in that rule

that a person will be confirmed in his appointment at the end of his period of probation, if he has fulfilled the two conditions therein laid down, the necessary implication is that so long as a person is not confirmed, he continues to be a probationer. I do not think rule 24 can be said to govern the period of probation of a member of the service. It, on the other hand, prescribes the conditions which will entitle the member concerned to an order of confirmation. Whether a person will or will not be entitled to confirmation may, therefore, be judged by this rule, but to urge on its account that the period of probation continues whenever there is no order of confirmation cannot be read in it. The period of probation is fixed under rule 23 and in order to find out whether a particular period is or is not part of the period of probation, the answer is to be found in the context of that rule.

In this connection it may be worthwhile to mention that service conditions do not necessarily always envisage the existence of two conditions only of a person's employment, namely, (i) the probationary period, and (ii) what is otherwise called the period of permanent service. A third condition of service, which is sometime called quasi-permanent or by the name of *sub protam* is also known. This third condition is an intermediate condition in which the employee, though he may not claim to be a permanent employee, can have a claim often known as lien on the post held by him. The Central Government actually have provision in their rules for such condition. My attention has not been drawn to any similar rule by the State Government, but what nevertheless is admitted in the present case is that the petitioner had been appointed to the post of a Deputy Collector substantively in a clear vacancy. His trial period was fixed for two years during which period he passed the first Departmental Exa-

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mination also. He got the first increment as well and then remained stopped at the stage of Rs.400 per month which was not the stage of crossing probationary period but the stage of an efficiency bar.

The petitioner has referred to the above facts including the fact that the period of probation came to an end on 2nd November, 1950, and relied on the following observations by a Division Bench of this Court in *State of U P. v. Kanshi Ram Anand* (1):

"the Government does not exercise its right under rule 19 to dispense with a member of the service or at the end of the period of his probation but retains him in its employment it must have deemed to have confirmed him in his employment;"

and urged that no action having been taken during or at the end of the said period of two years against him, he acquired a confirmed status from 3rd November, 1950. This was a case of an employee of the U. P. Public Health Services. Rule 19 of the U. P. Public Health Services, to which reference has been made by the Division Bench, is substantially on the same lines as rule 23(1) of the U. P. Civil Services (Executive Branch) Rules. According to the above observations the petitioner can perhaps urge that he acquired a permanent status from 3rd November, 1950, but in view of the fact that the observation relied upon was not directly necessary for the decision of the case before the Division Bench, nor is it necessary for deciding the dispute in the instant case, I shall refrain from expressing an opinion on the question whether the absence of an action to dispense with a member of the service during or at the end of his period of probation and his continuance in service subsequently has the effect of his confirmation in the appointment. The needs of the present case will be met by the finding alone that the period of probation had come to an end and that the action taken

(1) A. I. R. 1958 All. 844.



against the petitioner was not done during or at the end of the period of probation. The petitioner had been appointed substantively in a clear vacancy. During the probationary period he was on trial. This trial period ended on 2nd November, 1950. Since his appointment was in a clear vacancy and he had been appointed substantively, whether he was confirmed or not, a lien on his post ripened in his favour on the expiry of the period of probation.

It is not insignificant to note further that the charges on account of which the petitioner's employment was terminated were in respect of a period outside the probationary period of two years. He was in Jaunpur in 1953, nearly three years after 3rd November, 1950, and a majority of charges were in relation to his employment at this station. It too cannot, therefore, be said that the charges on which he has been removed from service were of a date when he was still on trial. If he was no longer on probation while at Jaunpur, which I think he was not, their nature only supported that rule 23 of the U. P. Civil Services (Executive Branch) Rules, read with rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules had no real application to his case.

To sum up, therefore, the above discussion, the petitioner was not a probationer at the time when his services were terminated; he had, on the other hand, in view of his substantive appointment in a clear vacancy, a lien on the post. Further, rule 55(3) of the Civil Services (Classification, Control and Appeal) Rules or rule 23 of the U. P. Civil Services (Executive Branch) Rules did not apply to his case. The termination of his appointment, which was for alleged misconduct, amounted to his removal from service, which attracted the provisions of Article 311 of the Constitution. Admittedly, the requisite conditions laid down in this Article

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were not fulfilled, nor was rule 55(1) of the Civil Services (Classification, Control and Appeal) Rules complied with. In these circumstances the order terminating his services is bad and illegal.

In the result, therefore, this petition is allowed and the order of the State Government terminating petitioner's services dated 24th July, 1957, is quashed. The petitioner will get his costs from the respondents.

*Petition allowed.*

## APPELLATE CIVIL

Before Mr. Justice Gurtu and Mr. Justice Roy  
MURLI MANOHAR AND OTHERS (DEFENDANTS)

v.

LACHHMANJI AND OTHERS (PLAINTIFS)

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**Guardian-ad-litem—Gross negligence—Minor's interest prejudiced—Decree, setting aside of.**

Where a guardian-ad-litem of a minor party to a suit did not merely absent himself when the proceedings in the final decree in a suit for partition were taken but also failed to prefer an appeal against the final decree, which seriously prejudiced the rights of the minor inasmuch as a substantial property which was part of the preliminary decree had been left out in the final decree without just cause specially in the circumstances where the preliminary decree had been confirmed by the appellate court, his action amounted to gross negligence, making the final decree liable to be set aside.

Case-law discussed.

First Appeal no. 172 of 1947, from a decree of R. S. Lal, Additional Civil Judge of Banaras, dated 22nd November, 1945.

The facts appear in the judgment.

G. P. Bhargava, for the appellants.

A. P. Pandey and K. N. Gupta for the respondents.

The judgment of the Court was delivered by—

Roy, J.:—This is a defendants' appeal arising out of a judgment, dated the 22nd November, 1946, passed by the Additional Civil Judge of Banaras by which a decree was granted to the plaintiffs respondents, setting aside the final decree dated 15th January, 1944, passed in partition suit no. 466 of 1939 of the court of the Munsif Havali, Banaras, on the ground of gross negligence on the part of the guardian-ad-litem of the minor plaintiffs. The parties to the suit are members of the same family. Defendants nos. 1 and 2, namely, Murli Manohar and Govind Lal, instituted the suit no. 466 of 1939 against the present plaintiffs and defendants nos. 3 to 15 for partition of the property specified in Schedule A of the present plaint, which admittedly was joint an-

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cestral property of the parties. There was another property, which was specified in Schedule B of the present plaint. This property was not included by the plaintiffs in the earlier suit aforesaid. In that case the natural guardians of the present plaintiffs who were then minors refused to act as their guardian-ad-litem and Sri Chhail Behari Lal Verma, a pleader of the court, was appointed their guardian-ad-litem. The defendants pleaded in that suit that the property specified in schedule B was also joint ancestral property and should be brought into hotch pot for purposes of partition. The trial court framed issue no. 6 on that point which was to the following effect:

"Whether the property specified in the written statement and under issue is property of the joint family of the parties? If so, how does the failure on the part of the plaintiffs to leave that property out of suit affect the suit?"

The trial court found on that issue that this property was joint family property and was liable to be partitioned. The trial court, therefore, by judgment and preliminary decree, dated 6th December, 1940, directed that a preliminary decree for partition of 1/6th share of the plaintiffs and of an equal share of the defendants nos. 5 and 6 in the property detailed at the foot of the plaint, (with the exception of houses nos. 241, 251, 243, 243/1, and 244), and also in the six shops situate in Mauza Sheodaspur be passed. Certain further directions were given under the preliminary decree with which we are not concerned. It was the property in Sheodaspur which was the subject of contention under issue no. 6 aforesaid. As against the judgment and decree of the 6th December, 1940, two appeals were preferred by different parties before the District Judge of Banaras. Both the appeals were dismissed by the Additional Civil Judge on the 21st September, 1940, and the decree of the trial court was affirmed. On 31st January, 1943,

Murli Manohar and Govind Lal applied in the court of the Munsif Haveli to get a final decree prepared in pursuance of, and in accordance with, the preliminary decree. In that proceeding no notice was issued to the present plaintiffs or to the other defendants nos. 3 to 15. The Amin was called upon to prepare Kuras for the preparation of the final decree. The Amin submitted a report on the 9th November, 1943. Certain objections were taken against it by the then plaintiffs and by defendants nos. 5 and 6 but some of them withdrew their objections subsequently. Defendants 1 and 3 also filed an objection against the Amin's report. Their objection was twofold, namely that the Amin had overvalued the property described as bungalow no. 8 within the cantonment of Banaras by valuing the site as a whole which belonged to the Government and in which the parties had no proprietary title; and, secondly, that these shops stood over plot no. 1 of Sheodaspur and plot no. 1 had already been partitioned by the revenue court. Learned Munsif, by his order dated 18th November, 1944, repelled the two objections stated above holding that the property had not been overvalued and that the shops at Sheodaspur could not be partitioned in the present suit because they stood over land which had already been partitioned by the revenue court. The learned Munsif was of the view that what was contained in the original judgment of the court and in the preliminary decree was a direction to the effect that "these shops could be partitioned if it was found that these shops were standing in the abadi land and not in plot no. 1 of Sheodaspur." The Munsif, therefore, by his final decree, dated 15th January, 1944, affirmed the plan and report prepared by the Amin with certain modifications in regard to the amount which was to be paid to defendants nos. 5 and 6. After the decree aforesaid was passed, two applications were

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presented before the Munsif, one by the present plaintiffs minors and the other by Misrilal the father of the present plaintiffs nos. 5 and 6 for the setting aside of the final decree, dated 15th January, 1944, and for restoring the case to file on its original number and for the rehearing of the Amin's report after allowing these parties the opportunity to raise objections against the same. Their contention was that they had no notice of the proceedings of final partition, that the Amin had prepared the lots behind the back of the parties without notice to them, that they had had no opportunity to file objections and that the bungalow in Banaras Cantonment was overvalued and the shops situate in Sheodaspur had been completely left out by him. These two applications were opposed by the then plaintiffs. The applications were dismissed on the 4th November, 1944, on the ground that the guardian-ad-litem of the minor defendants and the other defendants had full knowledge of the proceedings for preparation of the final decree. Against the order of 4th November, 1944, the guardian-ad-litem of defendants nos. 8, 9, 10, 11, 12, 15, 16 and 17, who are now the present plaintiffs, did not prefer an appeal. An appeal was, however, preferred by Misri Lal against that order before the District Judge of Banarās. The District Judge dismissed the appeal on the 1st February, 1945, holding that the orders were passed by the lower court after informing the parties' counsel and giving them full opportunity to be heard. The minors having failed to obtain proper redress in the proceedings aforesaid instituted the present suit on the 26th February, 1946, by which they assailed the final decree on the grounds of gross negligence on the part of their guardian in the suit. The negligence was said to exist in respect of two matters, namely, firstly, that six of the shops situate in village Sheodaspur which were covered by the preliminary decree as property fit for partition were not included

in the final decree and the guardian raised no objection about it; and, secondly, that the land over which bungalow no. 8 situate in Cantonment Banaras stood was wrongly valued. The decree was assailed on two other grounds which were stated in grounds nos. C and D; but these grounds were abandoned at the trial by the statement of the pleader of the plaintiffs.

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In paragraphs 10 and 11 of the present plaint the following averments were made:

"10. Babu Chhail Behari Guardian of the plaintiffs had not filed any objection in court in respect of the facts mentioned above, nor did he prefer any appeal against the order passed by the court of Munsif Havali, Banaras, or the decree.

"11. The report submitted by the Amin and the proceedings relating to the partition are prejudicial to the interest of the plaintiffs. But the guardian aforesaid did not bring them to the notice of the court and did not safeguard the rights of plaintiffs while looking after the said case, rather committed a serious negligence while looking after the case. For this reason the final decree passed by the court of Munsif, Havali, Banaras on 15th January 1944, is invalid and ineffectual against the rights of the plaintiffs and not binding."

The present suit was resisted by Murli Manohar, Govind Lal, Bhola Nath and Kashi Nath, defendants nos. 1, 2, 7 and 8. They contended that Babu Chhail Behari Lal the Guardian appointed by the court protected the interests of the minors to the fullest extent and that the charges of gross negligence were absolutely unfounded. They further contended that as the report of the Amin was quite proper Babu Chhail Behari Lal did not take any objection in respect thereof and that the other defendants raised objections in order to cause delay in the preparation of the final decree. It was

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not contended by these defendants in their written statement that the objection which was raised by the other defendants against the report of the Amin was an objection which, in the circumstances of the case, should be treated as an objection on behalf of the minors as well and that since that objection was prosecuted by the other defendants, the minor defendants must be deemed to have been effectively represented by them, or that, at any rate, their interests were sufficiently safeguarded and looked after by them when the objection was heard and dismissed. We have seen the terms of the preliminary decree and we have also perused the order, dated 15th January, 1944, passed by the Munsif when the final decree was passed. The preliminary decree, dated the 6th December, 1940, leaves no manner of doubt that the six shops situate in Sheodaspur were brought into the hotch pot and they were directed to be partitioned along with the other property specified in the plaint. The judgment of the Munsif passed on the 6th December, 1940, unequivocally found that the said shops are joint family property and had not been the subject of partition till then and were fit to be partitioned in the present suit. The learned Munsif fell into an error at the stage of the final decree when he acted upon the report of the Amin by which the Amin stated that these shops stood over plot no. 1 and not in the abadi and that plot no. 1 had already been partitioned. It was not open to the learned Munsif to go behind the terms of the preliminary decree. The learned Munsif was wrong in construing the preliminary decree as a conditional decree. In the judgment of the Munsif, dated the 15th January, 1944, the learned Munsif observed :

“Defendants 1 and 4 themselves brought these shops into the controversy and the court held that these shops could be partitioned if it was found that



these shops were in the abadi and not in plot no. 1 of Sheodaspur."

We have looked into the preliminary decree and we do not find that any such condition as stated above was attached to it.

The position, therefore, comes to this that a substantial item of property, which was covered by the preliminary decree and which was sought to be partitioned along with other properties, has been left out of the court altogether when the final decree was passed. This has seriously prejudiced the rights of the present plaintiffs who were then minors. The present plaintiffs were represented in that suit by Babu Chhail Behari Lal, Vakil, who was their guardian-ad-litem. Chhail Behari Lal failed to raise any objection at the time of the preparation of the final decree and he did not prefer any appeal against the final decree after it was prepared. Under circumstances such as these, there can be no two opinions that there was gross negligence on the part of the guardian-ad-litem and he never took care to safeguard the interests of the minors. The minors' interests could not have been represented or effectively safeguarded by Misri Lal or by the other major defendants at the trial of the original suit. Misri Lal and the other major members had refused to act as guardian of the minors. They could not be appointed as guardian-ad-litem without their consent in view of Order XXIII rule 4 of the Code of Civil Procedure as framed by this High Court. The decree, therefore, passed against the minors having been vitiated by gross negligence of the guardian can be set aside by a separate suit.

A Full Bench of this Court in *Rameshwar Prasad v. Ram Chandra Sharma* (1) has held that a decree obtained against a minor where the guardian appointed by the court has been guilty of gross negligence is not void but is merely voidable.

(1) A.I.R. 1951 All. 372

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In *Brij Lal v. Ram Sarup* (1) a Bench of this Court has held that gross negligence which may be interpreted as culpable neglect of the interests of the minor defendants, on the part of the guardian-ad-litem would entitle the minor to the avoidance of proceedings undertaken against him; but it is not every kind of negligence, nor every degree of negligence, which will render the proceedings otherwise legal and proper liable to be reopened. It must be such negligence as leads to the loss of a right which, if the suit had been resisted with due care, must have been successfully asserted. It is not sufficient to show that the guardian-ad-litem absented himself; it must also be proved that there was an available good ground of defence which was not put forward owing to the default of guardian-ad-litem to appear at the trial. An omission to defend or raise a particular plea or call certain evidence might, in the circumstances of a particular case, amount to negligence or to a breach of duty which was owing by the guardian to the infant in that case. In different circumstances such an omission might not amount to negligence. The thing to be regarded in each circumstance is the interest of the minor.

The view consistently held by this Court, and we may in this connection only quote the Full Bench case of *Siraj Fatma v. Mahmud Ali* (2) has been that the right of the minor to avoid a decree passed against him on the ground of negligence of his guardian-ad-litem is a substantive right well recognized in English law and equally applicable in India and such right of the minor either to ignore or to challenge the propriety of the order passed against him is undoubtedly one of civil nature and falls within the purview of section 9 of the Code of Civil Procedure. It has further been held that there is nothing in section 44 of the Evidence Act which

(1) (1926) I.L.R. 48 All. 44.

(2) (1932) I.L.R. 54 All. 646.

precludes the plaintiffs in such a suit from proving that the judgment previously obtained had been obtained on account of negligence of the guardian-ad-litem, that the Evidence Act does not purport to destroy any substantive right that may exist independently of that Act, that section 44 is merely permissive and not prohibitive; that it allows a party to prove fraud and collusion in order to avoid a judgment or order, but it does not go further to prevent him from adducing evidence of negligence of his guardian, if he has a substantive right to prove such negligence and thereby to avoid the judgment.

A review of all available authorities on the subject has been made by the Full Bench of the Patna High Court in *B. B. Kamakshya N. Singh v. Baldeo* (1) and the result of that review has been that with the exception of the Bombay High Court in the Full Bench case of *Krishnadas Padmanabhrao Chandravarkar v. Vithoba Annappa Shetti* (2) it has been laid down by all the High Courts that a minor can avoid a decree passed against him on the ground of gross negligence on the part of the guardian-ad-litem. It will be unnecessary for us to review all those decisions here because we are bound by the Full Bench decision of our own Court on this point. We may, however, say that we agree with the criticism of the Full Bench of the Bombay High Court, which has been made by the Full Bench of the Patna High Court in the above-noted case (1).

Learned counsel for the appellants has relied upon the observation of the Privy Council in the case of *Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao* (3). The relevant observations made by Lord THANKERTON in that case run as follows:

"In both Courts the principles relating to negligent conduct of a former litigation by a guardian in the name of a minor were accepted as applicable

(1) (1948) I.L.R. 27 Pat. 441. (2) A.I.R. 1939 Bom. 66.  
(3) (1936) L. R. 64 I. A. 17.

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to the case of parties litigating on behalf of a public interest, as in the present case. The cases illustrative of this principle, which are referred to in the judgments, are *Lalla Sheo Churn Lal v. Ramnandan Dobey* (1), *Punnayyah v. Viranna* (2), *Karri Bapanna v. Yerramma* (3) and *Ananda Rao v. Anna Rao* (4). Their Lordships are not concerned to discuss the "validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in *Karri Bapanna's* case (3) that the principle of section 44 of the Indian Evidence Act can be extended to cases of gross negligence.

The provisions of section 11 of the Civil Procedure Code are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts."

It is clear that their Lordships have been careful to express no opinion with regard to the validity of the decisions cited excepting one, i.e., *Karri Bapanna's*

(1) (1894) I.L.R. 22 Cal. 8.

(2) (1921) I. L. R. 45 Mad. 425.

(3) (1923) 45 M. L. J. 324.

(4) (1924) 47 M. L. J. 700.

case (1) that the Judges were wrong in extending section 44 of the Evidence Act to cases of gross negligence. But the Indian decisions taken as a whole do not place the minor's right of suit upon the provisions of section 44 but on a substantive right, which section 44 cannot affect. There is, therefore, no question of extending the principle of section 44 to cases of gross negligence. The Privy Council decision (2), on which reliance has been placed by learned counsel for the appellants does not, therefore, help the appellants. In the present case we are clear that the guardian-ad-litem did not merely absent himself when the proceedings in the final decree were taken, but he failed to prefer an appeal against the final decree which seriously prejudiced the rights of the minors. The guardian could have successfully brought before the trial court, or at any rate before the lower appellate court, that a substantial property which was part of the preliminary decree had been left out in the final decree without just cause, specially in the circumstances where the preliminary decree had been confirmed by the appellate court. There was available a good ground of defence at the time of the preparation of the final decree which was not put forward owing to the default of the guardian-ad-litem to appear at the stage of the final decree or at the stage when an appeal could have been preferred against it. This was a negligence so gross and palpable as led to the loss of a right. If the proceedings had been registered with due care, the right, should have been successfully asserted and enforced. Consequently we are of opinion that the decision of the court below on this point is correct.

It would be unnecessary for us to enter into the other point, namely, as to whether the site of the bungalow no. 8 in the Cantonment of Banaras should have been valued in the manner that it was valued by the

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(1) (1923) 45 M. L. J. 324.

(2) (1936) 64 I.A. 17.

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Amin because that question is no longer necessary to be decided for purposes of this appeal, once we agree with the court below that the final decree ought to be set aside on the ground of gross negligence on the part of the guardian-ad-litem.

In the result the appeal fails and is dismissed with costs.

*Appeal dismissed.*

### CIVIL MISCELLANEOUS

*Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal.*

RAM SARAN SAXENA .....(APPLICANT)

*v.*

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October, 9 BINDA PRASAD AND OTHERS ...(OPPOSITE-PARTIES).

**United Provinces Municipalities (Conduct of Election of Presidents and Election Petitions) Order, 1950, rr. 5 (a), 18, 24, 27, 28 of President—System of proportional representation—Two candidates securing equal votes—Result by lot—Constitution of India, 1950 Art. 226.**

In the case of an election under the system of proportional representation by means of the single transferable vote, where all the candidates except two have been excluded and the two continuing candidates have the same number of votes, the result of the election should be determined by lot, and not by taking into account the second preferences.

Civil Miscellaneous Writ No. 2008 of 1958.

The facts appear in the judgment.

*J. Swarup* and *S. B. Chaudhari*, for the applicant.

*Krishna Shankar*, for the opposite parties.

The judgment of the Court was delivered by—

MOOTHAM, C. J.: This is a petition under Art. 226 of the Constitution in which the petitioner, Sri Ram Saran Saxena, seeks to have quashed by a writ of *certio-*

*rari* the order of an Election Tribunal dated the 15th July, 1958.

The circumstances in which this petition has been filed are these. The petitioner and the second respondent, Sri Binda Prasad and the 4th and 5th respondents were candidates for election to the office of president of the Municipal Board of Sultanpur. The 4th and 5th respondents withdrew from the contest, and at the election, which was held on the 9th November, 1957, Sri Ram Saran Saxena was declared elected. The president of a Municipal Board is elected by the members of the Board under the system of proportional representation by means of the single transferable vote. The number of members voting in the present case was 20 and the Returning Officer held that each of the contesting candidates had obtained 10 first preference votes. In these circumstances he took into account the second preference votes of which two had been given in favour of Sri Ram Saran Saxena and one in favour of Sri Binda Prasad, and he accordingly declared Sri Ram Saran Saxena duly elected.

The defeated candidate Sri Binda Prasad filed an election petition in which he challenged the validity of Sri Ram Saran Saxena's election on two grounds: First, that the Returning Officer had included among the votes counted for Sri Ram Saran Saxena votes which had been cast in favour of Sri Binda Prasad and votes which were invalid and, secondly, in the alternative, that the Returning Officer was wrong in taking the second preferences into consideration, his proper course in the event of the candidates securing an equal number of first preference being to decide by lot which of them should be excluded. That petition was allowed by the Election Tribunal by the order the validity of which is the subject of the present petition. The Tribunal was of opinion that the Returning

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Officer misdirected himself on the question of the validity of certain of the votes cast, and that upon a correct accounting Sri Ram Saran Saxena had obtained only five first preferences while Sri Binda Prasad had obtained ten. The Tribunal was further of opinion that had the two candidates secured an equal number of first preferences, the course followed by the Returning Officer of taking into account the second preferences was correct. The Tribunal accordingly allowed the petition, set aside the election of Sri Ram Saran Saxena and declared Sri Binda Prasad duly elected.

Sri Ram Saran Saxena thereupon filed the petition which is now before us. The submissions made on behalf of Sri Ram Saran Saxena are two. Firstly, it is contended that the Election Tribunal wrongly rejected first preferences in favour of that candidate on an erroneous interpretation of the U. P. Municipalities (conduct of Election of Presidents and Election Petition) Order, 1955, and, secondly, that the Election Tribunal had no jurisdiction to enquire into the question whether the votes given at the election had been wrongly counted by the Returning Officer. For Sri Binda Prasad it was argued that the Tribunal was entitled to go into the question whether the votes had been wrongly counted and that its interpretation of rule 24 of the aforesaid Order was correct. It was further urged that, in the event of the Court holding that each candidate had secured the same number of first preferences, the final selection must be determined by lot.

The principal question argued before us has been with regard to the meaning and effect of rule 24 of the said order. That rule, so far as it is material, reads thus:

“(1) Every member shall have as many preferences as there are candidates, but no ballot paper



shall be considered invalid solely on the ground that all such preferences are not marked.

(1) A member in giving his vote—

(a) shall place on his ballot paper the figure 1 in the space opposite the name of the candidate whom he chooses for his first preference; and

(b) may, in addition, mark as many subsequent preferences as he wishes by placing on his ballot paper the figures 2, 3, 4 and so on, in the space opposite the "names of other candidates in order of preferences."

With this rule must also be read rule 27, which provides that—

"a ballot paper shall be invalid on which—

(a) the figure 1 is not marked; or

(b) the figure 1 is marked opposite the name of more than one candidate or is so marked as to render it doubtful to which candidates it is intended to apply; or

(c) the figure 1 and some other figure are marked opposite the name of the same candidate; or

(d) any mark is made by which the member may afterwards be identified."

Rule 18 provides that ballot papers to be used at an election shall be in a prescribed form which, excluding the counterfoil) we reproduce:

"Form of Ballot Paper

..... Municipality  
Election of President .....19.....  
Name Preferences

1. ....  
2. ....  
3. ....  
etc.

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## Instructions

1. The persons whose names are given on the ballot paper sent herewith have been nominated as candidate for election to the office of president of..... Municipality.

2. The vote shall be recorded by placing the figure 1 in the space opposite the name of the candidate whom the voter chooses for his first preference and the voter may, in addition, mark as may subsequent preferences as he wishes by placing the figures 2, 3, 4 and so on in the space opposite the names of other candidates in order of preference."

Clause( 2) of rule 24 provides that a member in giving his vote shall place on his ballot paper the figure 1 "in the space opposite the name of the candidate" whom he chooses for his first preference, and the main point of controversy is the meaning to be attached to the phrase "in the space opposite the name of the candidate". Learned counsel for Sri Binda Prasad stressed the use of the word "space", which he argued meant an area on the ballot paper wholly or partially enclosed. Now, under rule 18, the names of the candidates are to be inserted in the ballot paper in Hindi in alphabetical order, accordingly in the ballot paper used at this election the name of Sri Binda Prasad was placed immediately below the line numbered 1 and that of Sri Ram Saran Saxena immediately below the line numbered 2. In these circumstances learned counsel for Sri Binda Prasad argued that the space opposite the name of his client means the space between lines 1 and 2, and the space opposite the name of Sri Ram Saran Saxena is the space between lines 2 and 3; and this was the meaning given to the phrase in question by the Tribunal. Learned counsel for Sri Ram Saran Saxena argued that the word "space" did not refer to any area delineated on the ballot paper but meant to more than that part

of the ballot paper which can reasonably be described as being opposite the name of a candidate; and that in fact the ballot paper did not allot a space opposite the name of each candidate whether in the preferences of the voter are to be marked. This was the view taken by the Returning Officer.

In our opinion the second view is to be preferred. In the first place we consider that, in interpreting the phrase "the space opposite the name of the candidate", rule 24(2) must be read in conjunction with the prescribed form of the ballot paper. The word "space" does not necessarily mean an enclosed area, and the phrase "the space opposite the name of the candidate" does not necessarily mean more than that part of the ballot paper which is opposite the candidate's name. Had the ballot paper been in a form similar to that prescribed in schedule II of the English Ballot Act of 1873, there could have been no doubt as to the meaning of the word "space," for in that form the serial number of each candidate, the name of the candidate and the place at which the elector is required to make his mark are all enclosed in a rectangle. The form of the ballot paper which we have to consider is very different.

Instead of the places where the name of each candidate and the preferences of the elector are to be inserted being enclosed in a rectangle, they are indicated by a line, and the natural inference is that each preference is to be marked on or near the line allotted to the selected candidate. The form is, we think, not a very convenient one, for although the name of the candidate has to be inserted in Hindi and will, therefore, be immediately below the line, the number indicating the voter's preference may be in Arabic numerals and will then ordinarily be placed above the line. Secondly, it is clear that the form of ballot paper, containing as

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it does lines numbered 1, 2, and 3, is intended for use without any alteration or addition, in cases where there are three candidates and this object can be achieved on the assumption that the line opposite the candidate's name indicates the place where the preference recorded by the candidate is to be marked. Thirdly, rr. 24 and 27 must be read together, and when so read, it is we think clear that undue stress is not to be placed upon the word "space" in the former rule. Rule 27 enumerates the circumstances in which a ballot paper shall be invalid, and clause (b) of this rule provides that a ballot paper shall be invalid on which the figure 1 is marked opposite the name of more than one candidate or is so marked as to render doubtful as to which candidate it is intended to apply". The omission from this clause of the word "space" is significant and leaves no room for doubt that the test of the validity of a ballot paper (so far as this clause is concerned), is the intention of the elector. If the intention is clear, the ballot paper is valid; otherwise it is not.

We think that it is not in dispute that on this interpretation of rule 24 the finding of the Returning Officer that each of the two candidates received an equal number of first preferences, namely ten, is correct. We have ourselves examined the ballot papers and entertain no doubt that the choice of the voter in each instance has been clearly indicated and that each candidate obtained the same number of first preferences. We are clearly of opinion that the finding of the Tribunal to the contrary is erroneous. In these circumstances it is unnecessary for us to decide whether the Election Tribunal had jurisdiction to enquire into the question whether the votes given at the election had been wrongly counted by the Returning Officer.

For the reasons which we have stated we are of opinion that the Election Tribunal placed a wrong inter-

pretation upon rule 24. We are also of opinion that the Election Tribunal erred in law in holding that where as in the present case the only two candidates secured an equal number of first preferences the decision as to which of them should be elected has to be determined by taking into account the second preferences.

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Rule 28 of the Order provides that the Returning Officer shall determine the result of the voting in accordance with the instructions contained in Schedule II to the Order. The only part of that Order which is material for our present purpose is clause 5 which (excluding the Illustration), reads thus:

"5. If at the end of any count, no candidate can be declared elected—

(a) exclude the candidate who up to that stage has been credited with the lowest number of votes;

(b) examine all the ballot papers in his parcel and sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of votes in each such sub-paragraph and credit it to the candidate for whom such preference is recorded, transfer the sub-paragraph to that candidate and make a separate sub-paragraph of all the exhausted papers, and

(c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota.

If, when a candidate has to be excluded under clause (a) above, two or more candidates have been credited with the same number of votes and stand lowest on the poll, exclude that candidate who had secured the lowest

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number of first preference votes, and if that number also was the same in the case of two of more candidates decide by lot which of them shall be excluded."

This clause, and indeed the entire Schedule, seems to presuppose an election at which there are at least three candidates, and there would have been no difficulty in applying this clause in the present case had there been, in addition to Sri Ram Saxena and Sri Binda Prasad, a third candidate who had secured, say, eleven first preferences. In that event it would have been clear that Sri Ram Saran Saxena and Sri Binda Prasad together stood lowest on the poll and that one of them would necessarily have to be excluded by lot and thereafter the second preferences marked on the ballot papers of the excluded candidate would have been taken into consideration. The Schedule unfortunately makes no specific provision for the procedure which should be followed in the event of there being only two candidates who obtain equal number of first preferences or in the event of the last two candidates securing an equal number of votes after the second preferences marked on the excluded candidates' ballot papers have been taken into account. It has not, however, been suggested to us that there are, in such circumstances, more than two alternatives. Either, one of the candidates must be excluded by lot, or, the second preferences marked on the ballot paper of both candidates must be taken into account. We are of opinion that the second of these alternatives must be rejected as being wholly inconsistent with the principle underlying an election by the system of proportional representation by means of the single transferable vote. It is a fundamental feature of that system that the second preference of an elector is not taken into account unless and until the candidate who obtained his first preference has been excluded. The system does not contemplate any circumstances in which the first and second preferences of an

elector are taken into account at the same time. Under this system not more than one preference of an elector can be counted in favour of any continuing candidate, and this is recognized in clause 5 of the Schedule which makes it clear that it is only the next available preference of an excluded candidate which can be taken into account. In the case before us both candidates are continuing candidates, neither is an excluded candidate and accordingly no occasion has arisen for the taking into consideration of any second preference.

In our opinion the proper course to be followed in the case such as the present is to exclude one of the two candidates by lot. Although the Schedule does not, as we have pointed out, make any specific provision for the procedure to be followed in the event of there being only two candidates who obtain an equal number of first preferences, we think it does indicate the principle which is applicable. The Schedule contains instructions for Returning Officers for determining the result of an election, and it is to be presumed that such instructions are intended to cover all contingencies. Now it may happen that at an election at which there are a number of candidates all may be excluded except two who have obtained an equal number of votes. How then is the result of the election to be determined? Rule 5 (a) provides that, if at the end of any count no candidate can be declared elected, the candidate who at that stage has been credited with the lowest number of votes is to be excluded, and if two candidates having been credited with the same number of votes stand lowest on the poll then one of them is to be excluded by lot. Now where at an election all the candidates except two have been excluded and the two continuing candidates have the same number of votes, both of them can in our opinion, without unduly stretching the language of the clause, be said to

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stand lowest on the poll just as both can be said to stand highest on the poll, and if they can be said to stand lowest on the poll then clause 5 provides that the result of the election should be determined by lot. It is only by construing clause 5 in this manner that it is possible to provide for such a contingency, and we have no doubt that in such circumstances this is the course which the Returning Officer should follow. We are further of opinion that exactly the same procedure must be followed where there are only two candidates who obtained an equal number of first preferences.

The proper course in such circumstances is for the Returning Officer to decide by lot which of the two candidates is to be excluded. The Returning Officer in the present case was therefore, in our opinion, wrong in determining the result of the election by taking into account the second preferences.

In the result, therefore, this petition succeeds, and we direct the issue of a writ in the nature of *certiorari* quashing the order of the Election Tribunal dated the 15th July, 1958. In the circumstances we make no order as to costs.

*Petition allowed.*



## APPELLATE CIVIL

Before Mr. Justice Gurtu and Mr. Justice Roy

MOHAMMAD FAIYAZ KHAN

(PLAINTIFF)

v.

LALA PRITAM SINGH

(DEFENDANT)

1958

November, 4

**Usufruct**—During the pendency of proceedings under the U. P. Encumbered Estates Act, 1934—Maintainability of suit for the recovery of—Period of limitation—U. P. Encumbered Estates Act, 1934, ss. 4, 14 and 19 and 35—Code of Civil Procedure, 1908, ss. 11, 47, and Or. II, r. 2—Indian Limitation Act, 1908, Arts. 105 and 120.

Section 14 of the Encumbered Estates Act empowers the Special Judge to determine the amount, if any, due from the landlord to the claimant on the date of application under s. 4. There is, however, nothing in the Encumbered Estates Act or in s. 11 or O. II, rule 2 of the Code of Civil Procedure to bar a suit by the landlord for recovery of profits from the mortgagee in possession for the period between the application under s. 4 and the decree under s. 14(7).

Case-law discussed.

A suit for the recovery of such profits is governed by six years' rule of limitation under Art. 120 and not three years under Art. 105.

**Obliter.** The mere fact that the claim to set off for such profits was made in liquidation proceedings will not under s. 47 of the Code of Civil Procedure, be a bar to the suit.

Reasoning on the point in *Ram Paltan v. Murlidhar* (1) doubted.

First Appeal No. 199 of 1947, from a decree of C. B. Mathur, Judge Small Causes, exercising powers of Additional Civil Judge of Aligarh, dated the 18th December, 1946.

The facts appear in the judgment.

The judgment of the Court was delivered by—

Roy, J.:—This is a plaintiff's appeal arising out of a suit for the recovery of Rs.13,938-8 on account of

(1) A.I.R. 1946 Oudh 83.

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principal and interest, or whatever excess amount is found due by the defendant on accounting, together with future and *pendente lite* interest and costs of the suit upto the day of realization. The plaintiff mortgaged with possession under a possessory mortgage deed, dated 5th November, 1952, his entire property in villages Paraura and Muhkampur for Rs.60,000 to Roramal father of the defendant. Under the conditions of the mortgage it was agreed upon that the interest would be paid at the rate of 6 per cent per annum and that the mortgagee would be entitled to get Rs.200 annually as the costs of collection. It was stated in the mortgage deed that at the time of the mortgage the net profits from these two mortgaged villages, which were put in possession of the mortgagee, after remission of rent and payment of Government revenue, was Rs.5,938-11-5 per annum. It was further stated that the mortgagee would be liable to pay to the mortgagor, after deducting Rs.3,600 per annum as interest and Rs.200 per annum as costs of collection of rent, the net profit of Rs.2,138-11-5 per annum.

On the 15th of November, 1935, an application under section 4 of the U. P. Encumbered Estates Act was made by the plaintiff debtor. That application was forwarded in due course by the Collector to the Special Judge First Grade. Before the Special Judge written statements were filed by the debtor and also by the creditor under the provisions of the U. P. Encumbered Estates Act. In the debtor's written statement the nature and extent of the landlord's proprietary rights in the land, and the nature and extent of the landlord's property which was liable to attachment and sale under section 60 of the Code of Civil Procedure, exclusive of his proprietary rights in land, had been specified in terms of section 8 (1) (b) and (c)

of the U. P. Encumbered Estates Act. In those particulars the profit accruing out of the estate for the period 1346 to 1351 F, which period was subsequent to the date of the making of the written statements by the debtor and the creditor, had not been stated and could not have been stated "as property liable to attachment and sale under section 60 of the Civil Procedure Code." Before the Special Judge a compromise signed by the creditor and by the debtor applicant had been made on the 30th of April, 1936, which is Exhibit 12 on the record and is printed at pages 24 to 26 of our paper book. That compromise, *inter alia*, stated that Rora Mal the mortgagee in his capacity as a mortgagee had been in possession of the property mortgaged since the date of the mortgage, subject to the conditions mentioned in the mortgage deed and had been making collections and assessment. It contained certain other terms, but it did not specify what sum was due and legally recoverable from the mortgagor to the mortgagee on the date of the making of the application under section 4 of the U. P. Encumbered Estates Act, which was the crucial date because of the provisions of section 14 (2) of the U. P. Encumbered Estates Act. That section provides that the Special Judge shall examine each claim and after hearing such parties as desire to be heard and considering the evidence, if any, produced by them, shall determine the amount, if any, due from the landlord to the claimant on the date of the application under section 4. Upon the footing of the compromise, Exhibit 12, no decree was prepared by the Special Judge in favour of Rora Mal, the creditor. On the 16th of August, 1942, the Special Judge came to notice that the compromise of the 30th of April, 1936, could not be made the subject of a decree and consequently he passed an order to the effect that it could not be treated as adjustment of a claim and

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the compromise, therefore, stood abrogated and he would proceed to determine the amount which was legally recoverable on the date of the making of the application under section 4. Meanwhile Rora Mal died and his son Pritam Singh was brought on the record in his place. On the 24th of March, 1944, when the Special Judge proceeded to determine the claims, the pleaders of the parties made a statement which is Exhibit A-7 on the record printed on page 39 of the paper book. The statement was to the following effect:

"The amount due to Pritam Singh, son of Rora Mal, in respect of the usufructuary mortgage deed, dated the 5th of November, 1932, may be fixed at Rs.60,000 up to the date of application under the Encumbered Estates Act, i.e., up to the 15th of November, 1935, and a decree for Rs.60,000 may be passed against the applicant."

Upon the footing of that statement the learned Special Judge passed a decree for that sum on that very date. The decree is Exhibit A-2 printed on page 37 of the paper book and it is to the following effect:—

"It is ordered and decreed that the applicant should pay to the creditor Rs.60,000 together with interest at the rate of Rs.2 per cent per annum from the date of ejectment from the property mortgaged to the date of realization."

This decree, in view of section 14 (7) (b) (i), was a simple money decree. Under section 35 of the U. P. Encumbered Estates Act, if at any time after the decree granted by the Special Judge has been sent to the Collector under the provisions of section 19 of the Act any person entitled to possession of any property under the provisions of this Act applies to the Collector to be put in possession of such property, the Collector shall deliver possession of such property to him. After

the simple money decree had been passed in favour of Pritam Singh the creditor, the debtor applicant Mohammad Faiyaz Khan became entitled to possession over the property in terms of section 35 of the Act.

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It appears that in his written statement the creditor had contended that the plaintiff had taken the responsibility upon himself to look after the work of collection of rent and he kept the accounts and the receipts, and that those accounts should be gone into. Obviously the contention was that there should be certain adjustment in the determination of the claim when the simple money decree is to be passed by the Special Judge, regard being had to the provisions of section 14(2) and section 14(7) of the Act. When the statement Exhibit A-7, dated 24th of March, 1944, was given by the pleaders for the parties to the effect that the amount due to the creditor Pritam Singh in respect of this usufructuary mortgage up to the date of the making of the application under section 4 of the Act, i.e., up to the 15th of November, 1935, was Rs.60,000, it will be taken that proper regard had been taken by the parties on the question of any adjustment which was necessary between them upto the date of the application under section 4. During the pendency of the proceedings before the Special Judge, effort was made by the debtor-applicant by his application Exhibit A-3, dated the 11th of April, 1942, application Exhibit A-8, dated the 16th of March, 1944, and application Exhibit A-4, dated the 23rd March, 1944 to the effect that certain realization had been made by the mortgagee during the pendency of the proceedings and certain payments were due from the mortgagee to the mortgagor during that period and that adjustments thereof should be made. In the last application Exhibit A-4 it was said that under a rough account Rs.16,000 towards principal was due to the debtor applicant from the mortgagee and

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about Rs.5,000 were due as interest, in all Rs.21,000, and that they were fit to be deducted from the actual mortgage money. Obviously, since section 14(2) of the Act did not envisage that any accounting should be done for a period subsequent to the date of the application under section 4 and the Special Judge was required to determine the amount due from the landlord to the claimant on the date of the application under section 4, that matter was left undetermined by the Special Judge specially in view of the statement of the pleaders of the parties made on the 24th of March, 1944, already referred to above.

In the present suit the plaintiff, who was the debtor applicant before the Special Judge, claimed a sum of Rs.13,938-8 from Pritam Singh for the years 1346 Fasli to 1351 Fasli, (both years inclusive), as the amount which was due to him from Pritam Singh towards the surplus amount realised by him out of the mortgaged property, the period having fallen during the pendency of the proceedings in the Encumbered Estates case. A two-fold defence was raised by the defendant as against the claim. It was urged on his behalf that section 11 of the Code of Civil Procedure and section 14 of the Encumbered Estates Act barred the suit. It was further urged on his behalf that the claim was time-barred. A plea was also raised that during the period in question it was Mohammad Faiyaz Khan the plaintiff who was in realization of the usufruct of the property and consequently he could not claim an accounting. The court below held that section 11 of the Code of Civil Procedure and section 14 of the U. P. Encumbered Estates Act barred the suit and the suit was further barred by section 47 of the Code, as also by Order II, rule 2. The court below further held that Article 105 of the Limitation Act applied to the suit, that the suit was, therefore, barred by time in respect of the first

three years of profits but it was within time for the subsequent three years and that it was the plaintiff who made collections during the period in question and not the defendant and consequently the defendant was not liable to render any accounts to the plaintiff. The court below accordingly dismissed the suit.

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The first question which we have got to consider is whether it was the plaintiff or it was the defendant who was in possession over the property during the period in suit and who made collections for that period, and whether or not the defendant was at all accountable to the plaintiff. The mortgage-deed mentioned that the mortgagee had been put in possession over the property. It was no doubt true, as was proved by the letters, Exhibits A-16, A-17, A-18, A-19, A-20 and A-21 of the plaintiff, as also by the statement of Mohammad Istehsan a witness for the defendant, that Rora Lal remained in possession up to the end of Kharif 1351 Fasli and that he used to appoint 'karindas' on the recommendation of Mohammad Faiyaz Khan defendant and that Rora Mal used to maintain accounts and the account books used to remain in the possession of the 'karindas'. From the mere fact that the plaintiff Mohammad Faiyaz Khan made certain suggestions to Rora Mal from time to time in the appointment of karindas' and as to how the collections should be made, it would not be correct to say that Faiyaz Khan himself had been collecting the rents and had been in possession of the property and, therefore, the mortgage's liability to account to him for the excess profit ended. The statement of Mohammad Istehsan, the witness for the defendant, was completely overlooked by the court below and a wrong construction had been put upon the plaintiff's letters aforesaid, when the court came to the conclusion that it was the plaintiff who used to pay

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a part of the profits as an interest to the defendant and that the defendant did not use to make collections or to pay the profits to the plaintiff and consequently the defendant was not liable to render any accounts to the plaintiff. The fact that it was the mortgagee who was in possession and that he made collections during that time was further strengthened by the statement of counsel made on the 30th of April, 1936, which, though not effective as a compromise on which a decree under section 14 of the U. P. Encumbered Estates Act could be founded, was nevertheless an admission by the party concerned to the effect that Rora Mal the mortgagee had been in possession of the property mortgaged since then. That the mortgagee was still in possession on the date of the passing of the decree by the Special Judge is strengthened by the fact that when the Special Judge made the decree on the 24th of March, 1944, he directed that the debtor applicant should pay to the creditor not only the sum of Rs.60,000 but interest at the rate of Rs.2 per cent per annum from the date of ejectment of the property mortgaged to the date of realization. We are, therefore, unable to support the finding of the court below to the effect that it was the plaintiff who used to make collections and that, therefore, the defendant is not liable to render any accounts to the plaintiff. We are of opinion that the defendant as mortgagee was in possession over the property during the relevant period and that he cannot evade his liability to render accounts to the plaintiff for that period.

In order to determine the question as to whether section 11 and Order II, Rule 2, of the Code of Civil Procedure and section 14 of the U. P. Encumbered Estates Act barred the present suit, the learned Civil Judge relied upon certain decisions of the Board of Revenue, principally upon the decision in *Vilayat Ali*



v. *Mohammad Ismail* (1). In that case it was observed:—

“Where a simple money decree with *pendente lite* and future interest is passed in favour of a usufructuary mortgagee under section 14 (7), Encumbered Estates Act, the debtor applicant is entitled to have the profits of the property enjoyed by the mortgagee from the date of the application under section 4 up to the delivery of possession under section 35, set-off against the decree.

The Collector acting under Ch. 5, Encumbered Estates Act, is an executing court executing the decrees of the Special Judge. Since there is no provision in the Encumbered Estates Act for a claim to set-off, section 47, Civil Procedure Code, applies and this empowers the Collector and the S. D. O. to determine all questions arising between the parties or their representatives and relating to the execution, discharge, or satisfaction of the decree of the Special Judge. A claim to set-off can, therefore, be entertained by the S. D. O. in liquidation proceedings under section 47, Civil Procedure Code.

A claim to set-off cannot be treated as a claim to part adjustment of the decree under Order XXI, Rule 2(2), Civil Procedure Code, because for adjustment under that rule there must be an agreement between the parties relating to the execution of the decree and there can be no such agreement in a claim to set-off. Since Order XXI, Rule 2, Civil Procedure Code, does not apply and there is no express provisions for such an application for set-off, there is no limitation, and the S. D. O. has jurisdiction to entertain the claim at any time while executing the decree.”

(1) 1942 R. D. 939.

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The view of the Court propounded above in *Vilayat Ali v. Mohammad Ali* (1) and in certain other similar cases had not had the approval of this Court in *Dharam Singh v. Chajju Singh* (2). The Board's case in *Vilayat Ali v. Mohammad Ali* (1) came to the notice of the Oudh Chief Court in *Ram Paltan v. Murli Dhar* (3) and in that case it was held that where an application under section 4, U. P. Encumbered Estates Act, is filed by the mortgagor before the expiry of the term of the mortgage under which the mortgagee was to remain in possession for a term of years in lieu of principal and interest and a simple money decree with *pendente lite* and future interest is passed under section 14 (7) in favour of the usufructuary mortgagee, the applicant is entitled to bring a suit for profits against the mortgagee for the period intervening his application under section 4 and the date of the decree: that such a suit is not barred either under section 47 or under any of the provisions of the U. P. Encumbered Estates Act, provided the applicant mortgagor does not claim such profits as a set-off in the liquidation proceedings taken before the Collector under Chapter V of the Act; that the reason is that a Collector acting under Chapter V though not an executing court in the ordinary sense of the words has all the powers of an executing court, including the power to grant a set-off in respect of the profits realised by the mortgagee during the period intervening the date of the application and the date of the decree.

In the present case, as we have already said, the matter was raised before the Special Judge before the passing of the decree under section 14(7) of the Act, but the Special Judge did not go into the question and, we think, rightly, because what he was required to determine was what was due on the date of the making

(1) 1942 R.D. 939.

(2) 1945 O.W.N. 259.

(3) A.I.R. 1946 Oudh 83.

of the application under section 4 and not subsequently. The learned Judge was, therefore, clearly in error when he came to the conclusion that Encumbered Estates Act proceedings are also proceedings for redemption of mortgaged property and the account between the parties must be taken up to the date of the decree which is a final decree. Section 14(2) of the Act forbids the Special Judge from entering into adjudication of any matter on the question of claims subsequent to the date of the application under section 4. Consequently, when the decree was passed by the Special Judge, the Special Judge could not take account of any realization which might be said to have been made by the mortgagee subsequent to the making of the application under section 4. The learned Civil Judge was again in error when he said:—

“It appears from the facts stated above that the parties came to terms as regards the amount due up to the date of the decree, but in the compromise statement it was written that the amount was to be fixed as due on the date of the section 4 application . . . . The proceedings in the Encumbered Estates Act case show that the intention of the parties was that their disputes should be settled till the date of the decree.”

After making that observation the learned Civil Judge came to the conclusion that the dispute regarding profits could not be re-agitated again in the present suit and it was barred by section 11 of the Code and also by Order II, rule 2 of the Code of Civil Procedure because the plaintiff could have claimed his share of the profits up to the date of the decree in the proceedings before the Special Judge. These observations and findings cannot, in our opinion, be supported regard being had to the provisions of the law which we have already stated. It is not pretended that in the liqui-

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dation proceedings taken before the Collector under Chapter V of the Act any claim of set-off was made by the present plaintiff. There is no provision under the Encumbered Estates Act where the Collector can embark upon an enquiry after the decrees have been transmitted to him under section 19 of the Act as to whether any and what amount has been realised by the mortgagee during the period of the making of the application under section 14 and the period when the mortgagee has been dispossessed from the property in view of the provisions of the Act so that such amount may be adjusted against the claim which has been found due to the creditor by the Special Judge. We doubt very much the reasoning upon which that part of the decision in *Ram Paltan v. Murli Dhar* (1) was founded where it was held that a suit in the civil court will be barred under section 47 provided the applicant mortgagor does not claim such profits as a set-off in the liquidation proceedings taken before the Collector. In our opinion, and for reasons which we have already stated, the suit was neither barred by sections 11, 47 and Order II, rule 2, of the Code of Civil Procedure, nor by section 14 of the U. P. Encumbered Estates Act.

On the question of limitation we again find ourselves unable to agree with the Civil Judge that it was Article 105 of the Limitation Act which was applicable. The mortgage in question was a registered mortgage deed. A suit of the present nature would be governed by Article 120 of the Limitation Act which lays down a period of six years for the claim. The present suit was for a period of six years beginning from 1346 Fasli to 1351 Fasli, i.e., 1939 to 1944, both years inclusive. It was stated in the plaint that the cause of action for this suit arose on 1st August, 1939, the day on which the excess amount became payable for 1346 Fasli and on the same date on each succeeding year when the amount

(1) A.I.R. 1946 Oudh 83.

for other years became payable by the defendant. The suit having been filed on the 30th of July, 1945, was clearly within time.

In view of our findings the decree of the lower court cannot be upheld and ought to be set aside the case must go to that court for determination of the question as to what amount is due and legally recoverable by the plaintiff from the defendant.

In the result, we allow this appeal and set aside the decision of the court below dated 18th of December, 1946, and remand the suit to that court for decision in accordance with law. The appellant shall get his costs in this Court from the respondent. Costs in the court below shall abide the event.

*Appeal allowed.*

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## CIVIL REFERENCE

*Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal*

1958  
November, 17

SATENDRA KUMAR GUPTA AND ANOTHER  
(APPLICANTS)

v.

BANARAS IMPROVEMENT TRUST  
(OPPOSITE-PARTY)

**Code of Civil Procedure**, 1908, s. 113—*Reference—Tribunal under s. 57 of the Town Improvement Act, 1919—Court—Constitution of India, 1950, Art. 14—Discrimination—Provisions of s. 23(1) Land Acquisition Act, 1894, valid.*

A Tribunal appointed under s. 57 of the U. P. Town Improvement Act, 1919, is a court within the meaning of s. 113 of the Code of Civil Procedure, 1908, and is competent to state.

Section 23(1) of the Land Acquisition Act, 1894, added by sub-clause (3) of clause 10 of the Schedule to the U. P. Town Improvement Act 1919, does not involve discrimination contravening the provisions of Art. 14 of the Constitution.

*Adhar Kumar Mitra v. Sri Sri Iswar Radha Madan Mohan Jiu* (1) referred to.

Civil Miscellaneous Reference no. 296 of 1955, made by the Improvement Trust Tribunal, Banaras.

The facts appear in the judgment.

*G. P. Bhargava* and *S. K. Verma*, for the applicants.  
*Jagdish Swarup*, for the opposite party.

The judgment of the Court was delivered by—

MOOTHAM, C. J.:—This is a reference under section 113 of the Civil Procedure Code made by the Improvement Trust Tribunal, Banaras. The circumstances in which the reference is made can be stated shortly.

(1) (1931-32) 36 C.W.N. 370.

Under section 3 of the U. P. Town Improvement Act, 1919, a statutory body known as The Banaras Improvement Trust was created for the purpose of carrying out the provisions of that Act. The Trust was authorised to frame improvement schemes to provide for a number of matters, including schemes known as 'street schemes' for the purpose, *inter alia*, of improving existing means of communication and facilities of traffic. Under section 56 of the Act the Trust was further empowered, with the previous sanction of the State Government, to acquire land under the provisions of the Land Acquisition Act, 1894, as modified by the Town Improvement Act for the purpose of giving effect to an improvement scheme. Section 57 required a Tribunal to be constituted for the purpose of performing the functions of the court in reference to the acquisition of land for the Trust under the Land Acquisition Act, and the Tribunal which has made the present reference was a Tribunal so constituted.

In May, 1951, the State Government sanctioned an improvement scheme which had been prepared by the Banaras Improvement Trust. This scheme involved the widening of a road in Varanasi, and for the purpose of carrying the scheme into effect the Trust, with the previous sanction of the State Government, acquired a number of pieces of land and certain buildings which abutted on the existing road. Included among such properties was a strip of land averaging 76 feet wide covering an area of 1.41 acres which belonged to the applicants. By an order dated the 25th September, 1952, the Land Acquisition Officer awarded the applicants the sum of Rs.21,349-6-7 as compensation for the strip of land acquired from them and for a building standing on part thereof. The applicants did not accept this award and required a reference to be made

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to the Tribunal under section 18 of the Land Acquisition Act.

The compensation awarded by the Land Acquisition Officer to the applicants had been determined in accordance with the provisions of the Land Acquisition Act as modified by the Schedule to the Town Improvement Act. For our purpose the important modification is that made by sub-clause (3) of clause 10 of the Schedule which, so far as is material, provides that at the end of section 23 of the Land Acquisition Act the following shall be deemed to be added, namely:

“(3) For the purposes of clause *first* of sub-section (1) of this section—

(a) the market value of the land shall be the market value according to the use to which the land was put at the date with reference to which the market value is to be determined under that clauses”.

The effect of this amendment is to exclude the potential value of the land acquired when determining its market value which is calculated with reference only to the use to which the land is put on the relevant date.

It was contended by the applicants before the Tribunal that this sub-clause contravened the provisions of Article 14 of the Constitution and was invalid. The Tribunal was of opinion that this contention ought to be upheld and it has accordingly made this reference.

A preliminary objection has been taken to the hearing of this reference. It is that the Tribunal is not a ‘court’ within the meaning of the Code of Civil Procedure and was accordingly not competent to state a case under section 113 of that Code. We think there is no force in this objection. Section 57 of the Town Improvement Act provides that a Tribunal shall be constituted for the purpose of performing the functions



of the court in reference to the acquisition of land for the Trust under the Land Acquisition Act, 1894, and clause (a) of section 58 provides that the Tribunal shall, except for the purposes of section 54 of the Land Acquisition Act with which we are not concerned, be deemed to be the court under that Act. Section 53 of the latter Act provides that, save in so far as they may be inconsistent with anything contained therein, the provisions of the Code of Civil Procedure shall apply to all proceedings before the court under that Act. Reliance was placed on section 63 (1) of the Town Improvement Act, which empowers the State Government to make rules 'not repugnant to the Code of Civil Procedure' for the conduct of business by Tribunals, and it was argued that this provision implied that the provisions of the Code of Civil Procedure did not apply to these Tribunals. On the contrary, it appears to us that section 63 (1), when read with section 53 of the Land Acquisition Act, assumes that the provisions of the Code of Civil Procedure will be applicable to such Tribunals. We hold that the Tribunal is a court within the meaning of section 113 of the Code of Civil Procedure, and this appears also to have been the view of the Calcutta High Court in *Adhar Kumar Mitra v. Sri Sri Iswar Radha Madan Mohan Jiu* (1). The reference is, therefore, competent and the preliminary, objection is overruled.

The contention of the applicants is that the amended sub-section 23 (1) involves discrimination against the person whose property is acquired under the Town Improvement Act. It appears to us that this contention is not well founded. The Town Improvement Act makes provision for the payment of compensation for land acquired by an Improvement Trust, and it is conceded that those provisions cannot be challenged as

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involving any contravention of Article 31 of the Constitution. It is only because the Land Acquisition Act is also in force, and contains provisions for compensation which are more liberal than those to be found in the Town Improvement Act, that it is said that the latter involves an infringement of Article 14. It is true, of course, that both Acts are in force in the district of Varanasi and that land may be acquired under either. The acquiring authority is, however, different under the two Acts. Under the Land Acquisition Act the acquisition must be by the Government; under the Town Improvement Act the acquiring authority is the Improvement Trust itself. The position is, therefore, that in an area in which both Acts apply compensation for an acquisition of property by the Government will be determined pursuant to the provisions of the Land Acquisition Act, while compensation for an acquisition by an Improvement Trust will be assessed in accordance with the provisions of the Town Improvement Act. It is not suggested that there is any discrimination *inter se* between persons whose land is acquired under either Act; and we cannot see that a person whose property is acquired by an Improvement Trust under the Town Improvement Act can legitimately complain that it was not acquired by another authority under the Land Acquisition Act. If anyone can have a ground of complaint it would appear to be the body, (such, for example, as a company or Municipal or District Board), on behalf of which the Government acquires land, and which will have to pay the Government therefor a larger amount in respect of compensation than would have been payable had the acquisition been one made under the Town Improvement Act.

It is also to be noted that under section 66 of the Town Improvement Act, read with clause (a) of section 8 (1) of the Municipalities Act, whenever a municipal

board or other local authority acquires land with the object, *inter alia*, of "laying out . . . new public streets and acquiring land for the purpose . . ." the modifications of Land Acquisition Act contained in the Schedule to the Town Improvement Act shall apply to such acquisition. Laying out a new public street includes, in our opinion, the widening of an existing street . . . certainly to the extent to which it is widened it is new street . . . and accordingly in the present case the applicants would have not obtained any additional compensation had the acquisition of their property been made at the instance of the Varanasi Municipal Board.

In our judgment the reference must be answered in the negative.

*Reference rejected.*

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## APPELLATE CIVIL

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and Mr. Justice Dayal*

RAM AUTAR (APPELLANT)

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RENT CONTROL AND EVICTION OFFICER,  
JHANSI (RESPONDENT)

**United Provinces (Temporary) Control of Rent and Eviction Act, 1947, ss. 7(1)(a), 7(2) and 17; rr. 3, 4 and 6—Power of allotment in District Magistrate—Time within which exercisable.**

Rule 3 of the Control of Rent and Eviction Rules, 1949, requiring the District Magistrate to make an allotment within thirty days of the receipt of intimation of vacancy is directory and there is nothing in the rules or the rule making power of the State Government to preclude the exercise of the power of allotment after the expiry of that period.

*Lala Ram Narain Lal v. State of Uttar Pradesh* (1) and *Nawal Kishore v. The Rent Control and Eviction Officer, Bulandshahr* (2) overruled, *Haji Abdul Shakoor v. The Commissioner, Allahabad Jhansi Division* (3) adopted.

Special Appeal No. 507 of 1958, from a decision of JAMES, J., dated 17th September, 1958 in Civil Miscellaneous Writ No. 287 of 1957.

The facts appear in the judgment.

*A. Banerji*, for the appellant.

The standing counsel for the respondent.

The judgment of the Court was delivered by—

**MOOTHAM, C.J.:**—This is an appeal against an order of Mr. Justice JAMES dated the 17th September, 1958, dismissing a petition under Article 226 of the Constitution.

(1) Civil Misc. Writ No. 1437 of 1957, decided on 9th October, 1953.

(2) Civil Misc. Writ No. 2199 of 1957 decided on 17th October, 1958.

(3) 1955 A.L.J. 32.

The appellant is the owner of two adjacent houses, one of which was in occupation of a tenant. On the 17th October, 1955, the tenant vacated that house and made over possession of it to the appellant. Two days later, on the 19th October, the appellant informed the Rent Control and Eviction Officer that the premises had fallen vacant, and at the same time he asked that they be released in his favour as they were needed by him for his personal occupation. On the 31st October, the appellant appeared before the Rent Control and Eviction Officer and his statement was recorded. No action was, however, taken by the Rent Control and Eviction Officer, and on the 24th November the appellant wrote to that Officer informing him that he had occupied the premises and that they should not be allotted to any other person. On the 7th December, 1955, the Rent Control and Eviction Officer made an order rejecting the appellant's application that the premises be released in his favour, and by an order dated the 8th December he allotted the premises to the fourth respondent. Thereafter the appellant moved the Commissioner and the State Government for the reversal of the Rent Control and Eviction Officer's order allotting the premises to the fourth respondent. These efforts were unsuccessful, and the appellant then filed a petition in this Court in which he challenged the validity of the order of allotment on a number of grounds. The learned Judge dismissed the petition and the appellant now appeals.

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The only contention advanced in this Court is that the order of allotment in favour of the fourth respondent is invalid as the Rent Control and Eviction Officer must make an allotment order within thirty days of the receipt of a notice by the landlord that the premises have fallen vacant, and that at the expiry of that period he ceases to have power to do so.

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Now, section 7(1) (a) of the Control of Rent and Eviction Act provides that a landlord shall, within seven days after any accommodation becomes vacant, give notice of the vacancy in writing to the District Magistrate. Sub-section (2) then provides that—

“7(2), The District Magistrate may by general or special order require a landlord to let or not to let to any person any accommodation which is or has fallen vacant or is about to fall vacant.”

Rules 3 and 4 of the Control of Rent and Eviction Rules framed under section 17 of the Act are also relevant. They read thus:

“3. *Allotment order*.—The District Magistrate shall make an allotment order within thirty days of the receipt of the intimation sent by the landlord under section 7 (1) (a) of the Act and shall give notice thereof to the landlord.

4. *Landlord's right to let*.—If the landlord receives no notice from the District Magistrate within thirty days of the receipt by the District Magistrate of the intimation given by the landlord under section 7 (1) (a) the landlord may nominate a tenant and the District Magistrate shall allot the accommodation to his nominee unless, for reasons to be recorded in writing, he forthwith allots the accommodation to any other person.”

The Rules came into force in 1949, and until very recently it appears not to have been doubted that rule 3 was directory in character. In two cases, however, *Lala Ram Narain Lal v. State of Uttar Pradesh* (1) and *Nawal Kishore v. The Rent Control and Eviction Officer, Bulandshahr* (2) a learned Judge has held that where a landlord asks the District Magistrate to release in

(1) Civil Miscellaneous Writ No. 1437 of 1957, decided on 9th October, 1958.

(2) Civil Miscellaneous Writ No. 2199 of 1957, decided on 17th October, 1958.

his (the landlord's) favour premises which have fallen vacant rule 4 has no application, and that under rule 3 an allotment order must be made within thirty days of the intention referred to therein, the District Magistrate forfeiting his right to make an allotment order if he does not do so within this period. With the greatest respect to the learned Judge, we think this view is erroneous. The only restriction which is imposed by section 7 (2) on the power of a District Magistrate to issue an order requiring a landlord to let or not to let any accommodation is that that accommodation is or has fallen vacant, or is about to fall vacant. There is no restriction imposed by the Act with regard to the period within which an order shall be made, and in our opinion the State Government has no power to impose such a restriction by a rule. Under section 17 of the Act the State Government is empowered to make rules "to give effect to the purposes of this Act". The purposes of the Act are to control the letting and the rent of available accommodation and to prevent the eviction of tenants therefrom, and we are unable to hold that a rule which severely restricts the powers of a District Magistrate to control the letting of accommodation conferred upon him by the Act can properly be described as a rule giving effect to the purposes of the latter.

The Rules themselves have been somewhat loosely drafted. For example, the expression "allotment order", which is used in rule 3, is not to be found in the Act, nor is there any express power to be found in the Act to justify rule 6 which authorises the District Magistrate, in the circumstances therein stated, to permit a landlord to occupy the premises himself; see *Haji Abdul Shakoor v. The Commissioner, Allahabad-Jhansi Division* (1). Rule 3 requires a District Magistrate to make an allotment order within thirty days of the receipt of

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notice of the vacancy and to give notice thereof to the landlord. Rule 4 then provides that, if the landlord receives no such notice from the District Magistrate within that same period, he may nominate a tenant and the District Magistrate is bound to allot the accommodation to his nominee, unless for reasons to be recorded in writing he forthwith allots the accommodation to some other person. It is, therefore, clear from the latter rule that the District Magistrate has the power, even after the expiration of the period of thirty days, to make an order of allotment either in favour of the landlord's nominee, or, if he acts promptly, in favour of someone else.

Many difficulties will arise if r. 3 imposes an obligation on the District Magistrate to make an allotment order within the period of thirty days. Disputed questions of fact may arise as to whether the notice was actually sent by the landlord or whether the accommodation had become vacant. It may not always be possible for these questions to be determined within thirty days, and it appears to us that if the jurisdiction of the District Magistrate to make an allotment order ceases automatically at the expiry of that period, the result will be to frustrate rather than advance the purposes of the Act.

It is, of course, very desirable that an allotment order should be made as soon as possible and thirty days would appear to be reasonable period within which to expect that this be done, but on a consideration of the Rules and the Act we are unable to hold that the provision to this effect in rule 3 is mandatory. In our opinion it is only directory.

We are of opinion, therefore, that this appeal fails and it is accordingly dismissed.

*Appeal dismissed.*



## APPELLATE CIVIL

Before the Honourable O. H. Mootham, Chief Justice,  
and Mr. Justice Dayal

SUPERINTENDENT OF POLICE, MIRZAPUR AND <sup>1958</sup>December, 2.  
OTHERS (APPELLANTS)

v.

RAM MURAT SINGH AND ANOTHER (RESPONDENTS)

*Certiorari*—Want of jurisdiction in subordinate court or authority—Objection, when to be taken—Constitution of India. 1950, Art. 226.

It is a very salutary rule that the petitioner for a writ of *certiorari* must show that he has taken his objection to jurisdiction before the subordinate tribunal or authority itself or else explain, through the affidavit, his inability to do so. Failure to do either does not, however, operate as an absolute bar to the exercise of discretion in issuing the writ.

*Parshottam Lal Dhingra v. Union of India* (1) and *State of Uttar Pradesh v. Mohammad Nooh* (2) referred to, *Gandhi Nagar Motor Transport Society v. State of Bombay* (3) explained and *Rex v. Williams, ex parte Phillips* (4) applied. •

Held, further, that such an objection to the conduct of the petitioner disentitling him to relief could not be raised for the first time in Special Appeal.

Special Appeal No. 170 of 1957 from the decision of MEHROTRA, J., dated 29th January, 1957, in Civil Miscellaneous Writ No. 1855 of 1956.

The facts appear in the judgment.

S. S. Dhavan for the appellants.

S. C. Khare for the respondents.

The judgment of the Court was delivered by—

MOOTHAM, C. J. :—This is an appeal from an order of Mr. JUSTICE MEHROTRA, dated the 29th January, 1957.

(1) A.I.R. 1958 S.C. 36.

(2) A.I.R. 1958 S.C. 86.

(3) A.I.R. 1954 Bom. 202.

(4) L.R. [1914] 1 K.B. 608.

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The respondent, Sri Ram Murat Singh, was a head constable in the U. P. Police Force. In December, 1954, he and another head constable were charged under section 7 of the Police Act with remissness and dishonesty in the discharge of their duties. A departmental trial was held, which was conducted by Sri B. N. Singh, a Deputy Superintendent of Police. This officer found the charge to be established and was of opinion that both the persons charged should be dismissed from the Force, and an order to this effect was subsequently made by the Superintendent of Police on the 9th May, 1958. Against this order the respondent appealed to the Deputy Inspector General of Police, Eastern Range, Banaras, but his appeal was dismissed on the 22nd November, 1955, and an application in revision to the Inspector General of Police was rejected on the 24th June, 1955. Thereafter the respondent filed a petition in this Court under Article 226 of the Constitution in which he challenged the validity of the order dismissing him from service on a number of grounds. The learned Judge held that Sri B. N. Singh had, under the Police Regulations, no jurisdiction to conduct the Departmental trial, and on this ground he quashed the order dismissing the respondent from service and the subsequent orders on appeal and revision made by the Deputy Inspector General of Police and the Inspector General of Police. These officers now appeal.

The grounds of appeal are numerous but in view of the decisions of the Supreme Court in *Parshotam Lal Dhingra v. Union of India* (1) and the *State of U. P. v. Mohammad Nooh* (2), the learned Standing Counsel has made only one submission in this Court. It is that as the respondent did not raise the question of the authority of Sri B. N. Singh to conduct the enquiry before the Superintendent of Police or before the Deputy

(1) A.I.R. 1958 S.C. 36.

(2) A.I.R. 1958 S.C. 86

Inspector General of Police on appeal or before the Inspector General of Police in revision, it was not open to him to raise that question for the first time in a petition in this Court under Article 226 of the Constitution.

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This submission is not, in our opinion, well founded. Learned Standing Counsel has invited our attention to the case of *Gandhinagar Motor Transport Society v. State of Bombay* (1) in which, according to the head note, the Court held that—

“Before a question of jurisdiction of a tribunal is raised on a petition under Articles 226 and 227, the objection to jurisdiction must be taken before the tribunal whose order has been challenged.”

An examination of the judgment shows, however, that the Court did not intend to lay down so rigorous a rule as the head note would suggest, for it made it clear that whether in any case a writ should issue is a matter which always lies within the discretion of the Court. The fact that a petitioner has not raised the question of jurisdiction before the subordinate tribunal is not necessarily a bar to the objection being taken for the first time in a writ petition, the question will be whether he has by his conduct precluded himself from obtaining the relief for which he asks. The position is well stated by CHANNELL, J., in *Rex v. Williams ex parte Phillips* (2), who aid at page 613:

“In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ *ex debito justitiae*, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the

(1) A.I.R. 1954 Bom. 202.

(2) L.R. [1914] 1 K.B. 608.

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Court acts in granting or refusing the writ of *certiorari*. This special remedy will not be granted *ex debito justitiae* to a person who fails to state in his evidence on moving for the rule *nisi* that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them. . . . To such a one the granting of the writ is discretionary."

It is, however, "a very salutary rule", to use the words of ROWALATT, J., in the same case that a petitioner must show that he has taken his objection to jurisdiction before the tribunal whose order he is seeking to have quashed or state in his affidavit that he had no knowledge of the facts which would enable him to do so. We are of opinion, therefore, that Mr. JUSTICE MEHROTRA had a discretion to grant the respondent relief. It is, however, said that he ought not to have done so because the respondent did not disclose in his affidavit when it was that the officer who held the enquiry was not authorized to do so. That fact ought certainly to have been stated by the respondent, but it is clear that the point which has now been raised in this Court was not raised before the learned Judge. Had it been raised before him an opportunity could then have been given to the respondent to file a supplementary affidavit to make good the deficiency in his original affidavit. We are of opinion that there are no grounds for interfering with the order made by the learned Judge, and accordingly this appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) L.R. [1914] 1 K.B. 608.

## SUPREME COURT

## APPELLATE CIVIL

*Before the Honourable Sudhi Ranjan Das, Chief Justice, Mr. Justice Bhagwati, Mr. Justice Sinha, Mr. Justice Rao and Mr. Justice Wanchoo*

DEEP CHAND AND OTHERS (APPELLANTS)

v.

STATE OF UTTAR PRADESH AND OTHERS

1959  
January, 15

(RESPONDENTS)

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

**Uttar Pradesh Transport Service (Development) Act, 1955—**  
*Not wholly void—Art. 31, not offended—Motor vehicles (Amendment) Act, 1956—Scheme already framed not effaced—General Clauses Act, 1904, s. 6—Constitution of India, 1950, Arts. 13, 31, 254(2).*

The Uttar Pradesh Transport Service (Development) Act, 1955, did not on the passing of the Motor Vehicles (Amendment) Act, 1956 become wholly void under Art. 254(1) of the Constitution but continued to be a valid and subsisting law supporting the scheme already framed under the U. P. Act.

Even if the Motor Vehicles (Amendment) Act, 1956, be construed as amounting under Art. 254(2) of the Constitution to a repeal of the Uttar Pradesh Transport Service (Development) Act, 1955, such repeal did not destroy or efface the scheme already framed under the U. P. Act, for the provisions of s. 6 of the General Clauses Act, 1897 saved the same.

The Uttar Pradesh Transport Service (Development) Act, 1955, did not offend the provisions of the Constitution as it stood before the Constitution (4th Amendment Act), 1955, for the U. P. Act and in particular s. 11(5) thereof provided for the payment of adequate compensation.

Case-law discussed.

Civil Appeals nos. 380 to 389, 391 to 399, 401 429 and 431 to 434 of 1958, from judgments and decrees dated the 19th December, 1956, of the Allahabad High Court in Civil Misc. Writs nos. 1574, 1575, 1576, 1577, 1578, 1579, 1444, 1584, 1586, 1589, 1631, 1632, 1634, 1635, 1636, 1694, 1695, 1697, 1704, 1707, 3726, 1946, 1947, 1948 and 1949 of 1956.

The facts appear in the judgment of RAO, J.

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For the appellants (In Civil Appeals nos. 380—385, 387—389, 391—399 and 401 of 1958). *M. K. Nambiyar*, Senior Advocate, *Shyam Nath Kacker* Advocate, (*J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of Messrs. *Rajinder Narain* and Co. with them).

For the Appellants (In Civil Appeal no. 386 of 1958) *S. N. Kacker*, Advocate (*J. B. Dadachanji*, Advocate of Messrs. *Rajinder Narain* and Co. with him).

For the Appellants (In Civil Appeals nos. 429 and 431—434 of 1958) *Naunit Lal*, Advocate.

For the Respondents—(*K. L. Misra*) Advocate General U. P. and *K. B. Asthana* and *G. N. Dikshit*, Advocates.

The following judgments of the Court were delivered by—

DAS, C. J.:—We have had the advantage of perusing the judgment prepared by our learned Brother Subba Rao and we agree with the order proposed by him, namely, that all the above appeals should be dismissed with costs, although we do not subscribe to all the reasons advanced by him.

The relevant facts and the several points raised by learned counsel for the appellants and the petitioners in support of the appeals have been fully set out in the judgment which our learned Brother will presently deliver and it is not necessary for us to set out the same here. Without committing ourselves to all the reasons adopted by our learned Brother, we agree with his following conclusions, namely, (1) that the Uttar Pradesh Transport Service (Development) Act, 1955, (Act IX of 1955), hereinafter referred to as the U. P. Act, did not, on the passing of the Motor Vehicles (Amendment) Act, 1956, (100 of 1956), hereafter referred to as the Central Act, become wholly void under Article 254(1) of the Constitution but continued to be a valid and subsisting law supporting the scheme already framed under the U. P. Act; (2) that, even if the Central Act be construed as amounting, under Article 254(2),

to a repeal of the U. P. Act, such repeal did not destroy or efface the scheme already framed under the U. P. Act, for the provisions of section 6 of the General Clauses Act saved the same; (3) that the U. P. Act did not offend the provisions of Article 31 of the Constitution, as it stood before the Constitution (4th Amendment) Act, 1955, for the U. P. Act and in particular sec. 11(5) thereof provided for the payment of adequate compensation. These findings are quite sufficient to dispose of the points urged by *Mr. Nambiyar* and *Mr. Naunit Lal* in support of the claims and contentions of their respective clients.

In view of the aforesaid finding that the U. P. Act did not infringe the fundamental rights guaranteed by Article 31, it is wholly unnecessary to discuss the following questions, namely, (a) whether the provisions of Part III of the Constitution enshrining the fundamental rights are mere checks or limitations on the legislative competency conferred on Parliament and the State Legislatures by Articles 245 and 246 read with the relevant entries in the Lists in the Seventh Schedule to the Constitution or are an integral part of the provisions defining, prescribing and conferring the legislative competency itself and (b) whether the doctrine of eclipse is applicable only to pre-Constitution laws or can apply also to any post-Constitution law which falls under Article 13(2) of the Constitution. As, however, our learned Brother has thought fit to embark upon a discussion of these questions, we desire to guard ourselves against being understood as accepting or acquiescing in the conclusion that the doctrine of eclipse cannot apply to any post-Constitution law. A post-Constitution law may infringe either a fundamental right conferred on citizens only or a fundamental right conferred on any person, citizen or non-citizen. In the first case the law will not stand in the way of the exercise by the

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citizens of that fundamental right and, therefore, will not have any operation on the rights of the citizens, but it will be quite effective as regards non-citizens. In such a case the fundamental right will, *qua* the citizens, throw a shadow on the law which will nevertheless be on the Statute Book as a valid law binding on non-citizens and if that shadow is removed by a constitutional amendment, the law will immediately be applicable even to the citizens without being re-enacted. The decision in *John M. Wilkerson v. Charles A Rahrer* (1), cited by our learned Brother, is squarely in point. In other words, the doctrine of eclipse as explained by this Court in *Bhikaji Narain Dhakras v. The State of Madhya Pradesh* (2) also applies to a post-Constitution law of this kind. Whether a post-Constitution law of the other kind, namely, which infringes a fundamental right guaranteed to all persons, irrespective of whether they are citizens or not, and which, therefore, can have no operation at all when it is enacted, is to be regarded as a still born law as if it had not been enacted at all and, therefore, not subject to the doctrine of eclipse is a matter which may be open to discussion. On the findings arrived at in this case, however, a discussion of these aspects of the matter do not call for a considered opinion and we reserve our right to deal with the same if and when it becomes actually necessary to do so.

RAO, J.:—These twenty-five appeals are by certificate under Articles 132 and 133 of the Constitution granted by the High Court of Judicature at Allahabad and raise the question of the validity of the scheme of nationalization of State Transport Service formulated by the State Government and the consequential orders made by it.

The said appeals arise out of Writ Petitions filed by the appellants in the Allahabad High Court challeng-

(1) (1891) 140 U.S. 545; 35 L. Ed. 572. (2) (1955) 2 S.C.R. 589.



ing the validity of the U. P. Transport Services (Development) Act of 1955, being U. P. Act no. IX of 1955 (hereinafter referred to as the U. P. Act), and the notifications issued thereunder. All the appeals were consolidated by order of the High Court.

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The appellants have been carrying on business as stage carriage operators for a considerable number of years on different routes in Uttar Pradesh under valid permits issued under the Motor Vehicles Act, 1939, along with buses owned by Government. The U. P. Legislature, after obtaining the assent of the President on April 23, 1955, passed the U. P. Act and duly published it on April 24, 1955. Under section 3 of the U. P. Act, the Government issued a notification dated May 17, 1955, whereunder it was directed that the aforesaid routes along with others should be exclusively served by the stage carriages of the Government and the private stage carriages should be excluded from those routes. On November 12, 1955, the State Government published the notification under section 4 of the U. P. Act formulating the scheme for the aforesaid routes among others. The appellants received notices under section 5 of the U. P. Act requiring them to file objections, if any, to the said scheme; and after the objections were received, they were informed that they would be heard by a Board on January 2, 1956. On that date, the objections filed by the operators other than those of the Agra region were heard and the inquiry in regard to the Agra region was adjourned to January 7, 1956. It appears that the operators of the Agra region did not appear on the 7th. The notification issued under section 8 of the U. P. Act was published in the U. P. Gazette on June 23, 1956, and on June 25, 1956, the Secretary to the Regional Transport Authority, Agra, sent an order purported to have been issued by the Transport Commissioner to the operators

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of the Agra region prohibiting them from plying their stage carriages on the routes and also informing them that their permits would be transferred to other routes. On July 7, 1956, a notice was sent to the other operators in similar terms. The appellants filed Writ Petitions in the Allahabad High Court challenging the validity of the U. P. Act and the notifications issued thereunder.

The facts in Civil Appeal no. 429 of 1958 are slightly different from those in other appeals and they may be stated: The appellant's application for renewal of his permanent permit was rejected in 1953; but, on appeal, the State Transport Authority Tribunal allowed his appeal on September 6, 1956, and directed his permit to be renewed for three years beginning from November 1, 1953. Pursuant to the order of the Tribunal, the appellant's permit was renewed with effect from November 1, 1953, and it was made valid up to October 31, 1956. The scheme of nationalisation was initiated and finally approved between the date of the rejection of the appellant's application for renewal and the date when his appeal was allowed. The appellant applied on October 11, 1956, for the renewal of his permit and he was informed by the Road Transport Authority, Allahabad, that no action on his application, under reference was possible. The appellant's contention, among others, was that the entire proceedings were taken behind his back and, therefore, the scheme was not binding on him.

The appellants in thirteen appeals, namely, Civil Appeals nos. 387 to 389, 391 to 394, 396 to 399 and 401 and 429 were offered alternative routes. Though they tentatively accepted the offer, presumably on the ground that it was the lesser of the two evils, in fact they obtained stay as an interim arrangement and continued to operate on the old routes.

The appellants filed applications for permission to urge new grounds in the appeals, which were not taken before the High Court. The said grounds read:

“(i) That by reason of the coming into operation of the Motor Vehicles (Amendment) Act, no. 100 of 1956, passed by Parliament and published in the Gazette of India Extraordinary, dated 31st December, 1956, the impugned U. P. Act no. IX of 1955 has become void.

(ii) That by reason of Article 254 of the Constitution of India, the said impugned Act no. IX of 1955, being repugnant and inconsistent with the Central Act no. 100 of 1956, has become void since the coming into operation of the aforesaid Act no. 100 of 1956.”

The judgment of the Allahabad High Court, which is the subject matter of these appeals, was delivered on December 19, 1956. The Amending Act of 1956 was published on December 31, 1956. It is therefore manifest that the appellants could not have raised the aforesaid grounds before the High Court. Further, the grounds raise only a pure question of law not dependent upon the elucidation of any further facts. In the circumstances, we thought it to be a fit case for allowing the appellants to raise the new grounds and we accordingly gave them the permission.

*Mr.M. K. Nambiar*, appearing for some of the appellants, raised before us the following points: (i) The Motor Vehicles (Amendment) Act (100 of 1956) passed by the Parliament is wholly repugnant to the provisions of the U. P. Act and, therefore, the latter became void under the provisions of Article 254(1) of the Constitution; with the result that, at the present time, there is no valid law whereunder the Government can prohibit the appellants from exercising their fundamental right

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under the Constitution, namely, to carry on their business of motor transport; (ii) the scheme framed under the Act, being one made to operate in future and from day to day, is an instrument within the meaning of section 68-B of the Amending Act, and, therefore, the provisions of the Amending Act would prevail over those of the scheme, and after the Amending Act came into force, it would have no operative force; and (iii) even if the U. P. Act was valid and continued to be in force in regard to the scheme framed thereunder, it would offend the provisions of Article 31 of the Constitution, as it was before the Constitution (Fourth Amendment) Act, 1955, as, though the State had acquired the appellant's interest in a commercial undertaking, no compensation for the said interest was given, as it should be under the said Article. The other learned Counsel, who followed *Mr. Nambiar*, except *Mr. Naunit Lal*, adopted his argument. *Mr. Naunit Lal*, in addition to the argument advanced by *Mr. Nambiar* in regard to the first point, based his contention on the proviso to Article 254(2) of the Constitution rather than on Article 254(1). He contended that by reason of the Amending Act, the U. P. Act was repealed in *toto* and, because of section 68-B of the Amending Act, the operation of the provisions of the General Clauses Act was excluded. In addition, he contended that in Appeal no. 429 of 1958, the scheme, in so far as it affected the appellant's route, was bad inasmuch as no notice was given to him before the scheme was approved.

We shall proceed to consider the argument advanced by *Mr. Nambiar* in the order adopted by him; but before doing so, it would be convenient to dispose of the point raised by the learned Advocate General, for it goes to the root of the matter, and if it is decided in his favour, other questions do not fall for consideration. The question raised by the learned Advocate General

may be posed thus: whether the amendment of the Constitution removing a constitutional limitation on a legislature to make a particular law has the effect of validating the Act made by it when its power was subject to that limitation. The present case illustrates the problem presented by the said question. The U. P. Legislature passed the U. P. Act on April 24, 1955, whereunder the State Government was authorized to frame a scheme of nationalization of motor transport. After following the procedure prescribed therein, the State Government finally published the scheme on June 23, 1956. The Constitution (Fourth Amendment) Act, 1955, received the assent of the President on April 27, 1955. The State Government framed the scheme under the U. P. Act after the passing of the Constitution (Fourth Amendment) Act, 1955. Under the said Amendment Act clause (2) of Article 31 has been amended and clause (2-A) has been inserted. The effect of the amendment is that unless the law provides for the transfer of ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property within the meaning of clause (2) of that Article and, therefore, where there is no such transfer, the condition imposed by clause (2), viz., that the law should fix the amount of compensation or specify the principles on which and the manner in which the compensation is to be determined and given, is not attracted. If the amendment applies to the U. P. Act, as there is no transfer of property to the State, no question of compensation arises. On the other hand, if the unamended Article governs the U. P. Act, the question of compensation will be an important factor in deciding its validity. The answer to the problem so presented depends upon the legal effect of a constitutional limitation of the legislative power on the law made in deroga-

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tion of that limitation. A distinction is sought to be made by the learned Advocate General between the law made in excess of the power conferred on a legislature under the relevant List in the Seventh Schedule and that made in violation of the provisions of Part III of the Constitution. The former, it is suggested, goes to the root of the legislative power, whereas the latter, it is said, operates as a check on that power, with the result that the law so made is unenforceable, and as soon as the check is removed, the law is resuscitated and becomes operative from the date the check is removed by the constitutional amendment.

Mr. Nambiar puts before us the following two propositions in support of his contention that the law so made in either contingency is void *ab initio*: (i) The paramountcy of fundamental rights over all legislative powers in respect of all the Lists in the Seventh Schedule to the Constitution is secured by the double process of the prohibition laid by Article 13(2) and the restrictions imposed by Article 245, unlike the mere implied prohibition implicit in the division of power under Article 246; and (ii) where the provisions of an enactment passed by a legislature after January 26, 1950, in whole or in part—subject to the doctrine of severability—are in conflict with the provisions of Part III, the statute, in whole or in part, is void *ab initio*. This question was subjected to judicial scrutiny by this Court, but before we consider the relevant authorities, it would be convenient to test its validity on first principles.

The relevant Articles of the Constitution read as follows:

Article 245: “(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.”

"Article 246: "(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

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(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the "State List."

Article 13: "(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

Article 31 [Before the Constitution (Fourth Amendment) Act, 1955]:

"(1) No person shall be deprived of his property save by authority of law.

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(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given".

The combined effect of the said provisions may be stated thus: Parliament and the Legislatures of States have power to make laws in respect of any of the matters enumerated in the relevant lists in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution including Article 13, i.e., the power is made subject to the limitations imposed by Part III of the Constitution. The general power to that extent is limited. A Legislature, therefore, has no power to make any law in derogation of the injunction contained in Article 13. Article 13(1) deals with laws in force in the territory of India before the commencement of the Constitution and such laws in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. The clause, therefore, recognizes the validity of the pre-Constitution laws and only declares that the said laws would be void thereafter to the extent of their inconsistency with Part III; whereas clause (2) of that Article imposes a prohibition on the State making laws taking away or abridging the rights conferred by Part III and declares that laws made in contravention of this clause shall, to the extent of the contravention, be void. There is a clear distinction between the two clauses. Under clause (1), a pre-Constitution law subsists except to the extent of its in-



consistency with the provisions of Part III; whereas, no post-Constitution law can be made contravening the provisions of Part III, and, therefore, the law, to that extent, though made, is a nullity from its inception. If this clear distinction is borne in mind, much of the cloud raised is dispelled. When clause (2) of Article 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part III, it will not avail the State to contend either that the clause does not embody a curtailment of the power to legislate or that it imposes only a check but not a prohibition. A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions; nor can we appreciate the argument that the words "any law" in the second line of Article 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and, therefore, any law made in contravention of that clause pre-supposes that the law made is not a nullity. This argument may be subtle but is not sound. The words "any law" in that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still-born law.

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Cooley in his book "Constitutional Limitation", (Eighth Edition, Volume I), states at page 379:

"From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the

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act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions."

The Judicial Committee in *The Queen v. Burah* (1) observed at page 193 as under:

"The established courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted."

The Judicial Committee again in *Attorney-General for Ontario v. Attorney-General for Canada* (2) crisply stated the legal position at page 583 as follows:

"... if the text is explicit the text is conclusive, alike in what it directs and what it forbids." The same idea is lucidly expressed by MUKHERJEA, J., as he then was, in *K. C. Gajapati Narayan Deo v. The State of Orissa* (3). It is stated at page 11 as follows:

"If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers."

The learned Judge in the aforesaid passage clearly accepts the doctrine that both the transgression of the

(1) (1878) L.R. 5 I.A. 178.

(2) L.R. [1912] A.C. 571.

(3) (1954) S.C.R. 1.

ambit of the entry or of the limitation provided by the fundamental rights are equally transgressions of the limits of the State's constitutional powers.

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It is, therefore, manifest that in the construction of the constitutional provisions dealing with the powers of the legislature, a distinction cannot be made between an affirmative provision and a negative provision; for, both are limitations on the power. The Constitution affirmatively confers a power on the legislature to make laws within the ambit of the relevant entries in the lists and negatively prohibits it from making laws infringing the fundamental rights. It goes further and makes the legislative power subject to the prohibition under Article 13(2). Apparent wide power is, therefore, reduced to the extent of the prohibition.

If Articles 245 and 13(2) define the ambit of the power to legislate, what is the effect of a law made in excess of that power? The American Law gives a direct and definite answer to this question. Cooley in his "Constitutional Limitations", (English Edition, Volume I), at page 382 under the heading "Consequences if a statute is void" says:

"When a statute is adjudged to be unconstitutional, it is as if it had never been. . . . and what is true of an Act void *in toto* is true also as to any part of an Act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

In Rottschaefer on Constitutional Law, much to the same effect is stated at page 34:

"The legal status of a legislative provision in so far as its application involves violation of constitutional provisions, must, however, be determined in the light of the theory on which Courts ignore it

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as law in the decision of cases in which its application produces unconstitutional results. That theory implies that legislative provisions *never had legal force* as applied to cases within that clause."

In "Willis on Constitutional Law", at page 89:

"A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so far as the determination of the rights of private parties is concerned. The Courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed.

"Willoughby on Constitution of the United States", Second Edition, Volume I, page 10:

"The Court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no application.

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted. 'An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted'.

However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as, for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal

Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the Act does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed."

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For the former proposition, the decision in *Newberry v. United States* (1) and for the latter proposition the decision in *John M. Wilkerson v. Charles A. Rahrer* (2) are cited. In *Newberry's* case (1) the validity of the Federal Corrupt Practices Act of 1910, as amended by the Act of 1911, fixing the maximum sum which a candidate might spend to procure his nomination at a primary election or convention was challenged. At the time of the enactment, the Congress had no power to make that law, but subsequently, by adoption of the 17th Amendment, it acquired the said power. The question was whether an after-acquired power could validate a statute which was void when enacted. Mr. JUSTICE McREYNOLDS delivering the opinion of the Court states the principle at page 920:

"Moreover, the criminal statute now relied upon ante-dates the 17th Amendment, and must be tested by powers possessed at time of its enactment. An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted."

In *Wilkerson's* case (2) the facts were that in June, 1890, the petitioner, a citizen of the United States and an agent of Maynard, Hopkins and Co., received from his principal intoxicating liquor in packages. The packages were shipped from the State of Missouri to various points in the State of Kansas and other States. On August 9, 1890, the petitioner offered for sale and sold two packages in the State of Kansas. The packages sold were a portion of the liquor shipped by Maynard,

(1) (1921) 236 U.S. 232; 65 L. Ed. 913.

(2) (1891) 140 U.S. 545; 35 L. Ed. 572.

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Hopkins and Co. It was sold in the same packages in which it was received. The petitioner was prosecuted for violating the Prohibitory Liquor Law of the State of Kansas; for, under the said law, "any person or persons who shall manufacture, sell or barter any intoxicating liquors, shall be guilty of a misdemeanour". On August 8, 1890, an Act of Congress was passed to the effect that intoxicating liquors transported into any State should upon arrival in such State be subject to the operation and effect of the laws of such State. It will be seen from the aforesaid facts that at the time the State Laws were made, they were valid, but they did not operate upon packages of liquors imported into the Kansas State in the course of inter-State commerce, for the regulation of inter-State commerce was within the powers of the Congress; and that before the two sales in the Kansas State, the Congress made an Act making intoxicating liquors transported into a State subject to the laws of that State, with the result that from that date the State Laws operated on the liquors so transported. Under those circumstances, the Supreme Court of the United States held:

"It was not necessary, after the passage of the Act of Congress of August 8, 1890, to re-enact the Law of Kansas of 1899, forbidding the sale of intoxicating liquors in that State, in order to make such State Law operative on the sale of imported liquors."

The reason for the decision is found at page 578:

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That

Act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State Law was required before it could have the effect upon imported which it had always had upon domestic property."

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A reference to these decisions brings out in bold relief the distinction between the two classes of cases referred to therein. It will be seen from the two decisions that in the former the Act was void from its inception and in the latter it was valid when made but it could not operate on certain articles imported in the course of inter-State trade. On that distinction is based the principle that an after-acquired power cannot, *ex proprio vigore*, validate a statute in one case, and in the other, a law validly made would take effect when the obstruction is removed.

The same principle is enunciated in *Carter v. Egg and Egg Pulp Marketing Board* (1). Under section 109 of the Australian Constitution "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the consistency, be invalid." Commenting on that section, LATHAM, C. J., observed at page 573:

"This section applies only in cases where, apart from the operation of the section, both the Commonwealth and the State Laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power, no question can arise under the section. The word 'invalid' in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed the State law would again become operative."

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We shall now proceed to consider the decisions of this Court to ascertain whether the said principles are accepted or departed from. The earliest case is *Keshavan Madhava Menon v. The State of Bombay* (1). There the question was whether a prosecution launched under the Indian Press (Emergency Powers) Act, 1931, before the Constitution could be continued after the Constitution was passed. The objection taken was that the said law was inconsistent with fundamental rights and, therefore, was void. In the context of the question raised, it became necessary for the Court to consider the impact of Article 13(1) on the laws made before the Constitution. The Court, by a majority, held that Article 13(1) of the Indian Constitution did not make existing laws which were inconsistent with fundamental rights void *ab initio*, but only rendered such laws ineffectual and void with respect to the exercise of the fundamental rights on and after the date of the commencement of the Constitution and that it had no retrospective effect. Das, J., as he then was, observed at page 233:

"It will be noticed that all that this clause declares is that all existing laws, *in so far as they are inconsistent* with the provisions of Part III shall, *to the extent of such inconsistency*, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation."

At page 234, the learned Judge proceeded to state:

"They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights.

(1) 1951 S.C.R. 228.



Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights . . . . Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution."

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At page 235, the same idea is put in different words thus:

" . . . . Article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution."

At page 236, the learned Judge concludes:

"So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights."

MAHAJAN, J., as he then was, who delivered a separate judgment, put the same view in different phraseology at page 251:

"The effect of Article 13(1) is only prospective and it operates in respect to the freedoms which are infringed by the State subsequent to the coming into force of the Constitution but the past acts of a person which came within the mischief of the law then in force are not affected by Part III of the Constitution."

The learned Judge, when American law was pressed on him in support of the contention that even the pre-Constitution law was void, observed thus, at page 256:

"It is obvious that if a statute has been enacted and is repugnant to the Constitution, the statute is void since its very birth and anything done under it is also void and illegal. The courts in America

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have followed the logical result of this rule and even convictions made under such an unconstitutional statute have been set aside by issuing appropriate writs. If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law. This rule, however, is not applicable in regard to laws which were existing and were constitutional according to the Government of India Act, 1935. Of course, if any law is made after the 25th January, 1950, which is repugnant to the Constitution, then the same rule will have to be followed by courts in India as is followed in America and even convictions made under such an unconstitutional law will have to be set aside by resort to exercise of powers given to this Court by the Constitution."

Mukherjea, J., as he then was, in *Behram Khurshed Pesikaka v. The State of Bombay* (1) says at page 652 much to the same effect:

"We think that it is not a correct proposition that constitutional provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State Legislatures

(1) (1955) 1 S.C.R. 613.

as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of Constitution. A mere reference to the provisions of Article 13(2) and Articles 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution."

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The effect of the decision may be stated thus: The learned Judges did not finally decide the effect of Article 13(2) of the Constitution on post-Constitution laws for the simple reason that the impugned law was a pre-Constitution one. Article 13(1) was held to be prospective in operation and, therefore, did not affect the pre-existing laws in respect of things done prior to the Constitution. As regards the post-Constitution period, Article 13(1) nullified or rendered all inconsistent existing laws ineffectual, nugatory or devoid of any legal force or binding effect with respect to the exercise of the fundamental rights. So far as the past acts were concerned, the law existed, notwithstanding that it did not exist with respect to the future exercise of the said rights. As regards the pre-Constitution laws, this decision contains the seed of the doctrine of eclipse developed by my Lord the Chief Justice in *Bhikaji Narain Dhakras v. The State of Madhya Pradesh* (1) where it was held that as the pre-Constitution law was validly made, it existed for certain purposes even during the post-Constitution period. This principle has no application to post-Constitution laws infringing the fundamental rights as they would be *ab initio* void in *toto* or to the extent of their contravention of the fundamental rights.

The observations of the learned judges made in the decision cited above bring out the distinction between

(1) (1955) 2 S.C.R. 589.

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pre-and post-Constitution laws which are repugnant to the Constitution and the impact of Article 13 on the said laws.

In *Behram Khurshed Pesikaka's Case* (1), this Court considered the legal effect of the declaration made in the case of *The State of Bombay v. F. N. Balsara* (2) that clause (b) of section 13 of the Bombay Prohibition Act, (Bombay XXV of 1949), is void under Article 13(1) of the Constitution in so far as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol and held that it was to render part of section 13(b) of the Bombay Prohibition Act inoperative, ineffective and ineffectual and thus unenforceable. Bhagwati, J., at page 620, cited all the relevant passages from text books on Constitutional Law and, presumably, accepted the view laid down therein to the effect that an unconstitutional Act in legal contemplation is as though it had never been passed. JAGANNADILADAS, J., at page 629, noticed the distinction between the scope of clauses (1) and (2) of Article 13 of the Constitution. After citing a passage from "Willoughby on Constitution of the United States", the learned Judge observed:

"This and other similar passages from other treatises relate, however, to cases where the entire legislation is unconstitutional from the very commencement of the Act, a situation which falls within the scope of Article 13(2) of our Constitution. They do not directly cover a situation which falls within Article 13(1). . . . The question is what is the effect of Article 13(1) on a pre-existing valid statute, which in respect of a severable part thereof violates fundamental rights. Under Article 13(1) such part is "void" from the date of the commencement of the Constitution, while the other part continues to be valid. Two views of the result

(1) (1955) 1 S.C.R. 613.

(2) 1951 S.C.R. 682.

brought about by this voidness are possible, viz., (1) the said severable part becomes *unenforceable*, while it remains part of the Act, or (2) the said part goes out of the Act and the Act stands *appropriately amended pro tanto*. The first is the view which appears to have been adopted by my learned brother, Justice VENKATARAMA AIYAR, on the basis of certain American decisions. I feel inclined to agree with it. This aspect, however, was not fully presented by either side and was only suggested from the Bench in the course of arguments. We have not had the benefit of all the relevant material being placed before us by the learned advocates on either side. The second view was the basis of the arguments before us. It is, therefore, necessary and desirable to deal with this case on that assumption."

This passage shows that his opinion—though a tentative one—was that the severable part became unenforceable while it remained part of the Act. But the learned Judge made an incidental observation that the American view applied to cases that fall within the scope of Article 13(2) of the Constitution, i.e., the entire legislation would be unconstitutional from the very commencement of the Act. Venkatarama Aiyar, J., founded his decision on a broader basis. At page 639, the learned Judge observed:

"Another point of distinction noticed by American jurists between unconstitutionality arising by reason of lack of legislative competence and that arising by reason of a check imposed on a competent Legislature may also be mentioned. While a statute passed by a Legislature which had no competence cannot acquire validity when the Legislature subsequently acquires competence, a statute which was within the competence of the Legislature at the

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time of its enactment but which infringes a constitutional prohibition could be enforced *proprio vigore* when once the prohibition is removed."

On the basis of this distinction, the learned Judge held that Art. 13(1) of the Constitution only placed a check on a competent legislature and, therefore, the word "void" in that Article meant "relatively void", i.e., the law only condemned the Act as wrong to individuals and refused to enforce it against them. In support of the said conclusion the learned Judge cited a passage from "Willoughby on the Constitution of the United States". A comparison of the passage cited with that in the text book discloses that one important sentence which makes all the difference to the legal position is omitted by mistake and that sentence is, "An after-acquired power cannot *ex proprio vigore* validate a statute void when enacted". The second paragraph in the extract on which the learned Judge placed reliance and also the decision relied upon by him did not support his conclusion. As already stated, the decision and the passage dealt not with a case where the State had no power to make the law, but with a case where the law lay dormant till a law of the Federal Congress removed the conflict between the State Law and the Federal Law. That case may by analogy be applied to Art. 13(1) in respect of laws validly made before the Constitution but cannot be invoked in the case of a statute which was void when enacted. By a subsequent order, this Court granted the review and re-opened the case to enable the Bench to obtain the opinion of a larger Bench on the Constitutional points raised in the judgment delivered by the learned Judges. That matter came up before a Constitutional Bench, and MAHAJAN, C. J., who was a party to the decision in *Keshavan Madhava Menon's Case* (1), explained the majority view therein on the meaning

(1) 1951 S.C.R. 228.

of the word "void" in Art. 13(1) thus, at page 651:—

"The majority, however, held that the word "void" in Article 13(1), so far as existing laws were concerned, could not be held to obliterate them from the statute book, and could not make such laws void altogether, because in its opinion, Article 13 had not been given any retrospective effect. The majority, however, held that after the coming into force of the Constitution the effect of Article 13(1) on such repugnant laws, was that it *nullified* them, and made them ineffectual and nugatory and devoid of any legal force or binding effect. It was further pointed out in one of the judgments representing the majority view, that the American rule that if a statute is repugnant to the Constitution the statute is void from its birth, has no application to cases concerning obligations incurred or rights accrued in accordance with an existing law that was constitutional in its inception, but that if any law was made after the 26th January, 1950, which was repugnant to the Constitution, then the same rule shall have to be followed in India as followed in America. The result, therefore, of this pronouncement is that the part of the section of an existing law which is unconstitutional is not law, and is null and void. For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January, 1950, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution. Thus, in this situation, there is no scope for introducing terms like "relatively void" coined by American Judges

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in construing a Constitution which is not drawn up in similar language and the implications of which are not quite familiar in this country."

The learned Judge, as we have already pointed out, rejected the distinction made by Venkatarama Aiyar, J., between lack of legislative power and the abridgment of the fundamental rights. Though that question did not directly arise, the learned Judge expressed his view on the scope of Art. 13(2) at page 653 thus:

"The authority thus conferred by Articles 245 and 246 to make laws subjectwise in the different Legislatures is qualified by the declaration made in Article 13(2). That power can only be exercised subject to the prohibition contained in Article 13(2). On the construction of Article 13(2) there was no divergence of opinion between the majority and the minority in *Keshava Madhava Menon v. The State of Bombay* (1). It was only on the construction of Article 13(1) that the difference arose because it was felt that that Article could not retrospectively invalidate laws which when made were constitutional according to the Constitution then in force."

DAS, J., as he then was, in his dissenting judgment differed from the majority on other points but does not appear to have differed from the aforesaid views expressed by MAHAJAN, C. J., as regards the scope of *Keshava Madhava Menon's Case* (1) on the meaning of the word "void" in Art. 13(1). This judgment is, therefore, an authority on two points and contains a weighty observation on the third: (i) when the law-making power of a State is restricted by written fundamental law, then any law opposed to the fundamental law is in excess of the legislative authority and is thus a nullity; (ii) even in the case of a statute to which Art. 13(1) applies, though

(1) 1951 S.C.R. 228.



the law is on the statute book and be a good law, when a question arises for determination of rights and obligations incurred prior to January 26, 1950, the part declared void should be notionally taken to be obliterated from the section for all intents and purposes; and (iii) on the construction of Art. 13(2), the law made in contravention of that clause is a nullity from its inception.

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The next case is a direct one on the point and that is *Saghir Ahmad v. The State of U. P.* (1). There, the U. P. Road Transport Act (II of 1951), was passed enabling the State to run stage carriage service on a route or routes to the exclusion of others. Under that Act, the State Government made a declaration extending the Act to a particular area and issued a notification setting out what purported to be a scheme for the operation of the stage carriage service on certain routes. At the time the said Act was passed, the State had no such power to deprive a citizen of his right to carry on his transport service. But after the Act, Art. 19(1) was amended by the Constitution (First Amendment) Act, 1951, enabling the State to carry on any trade or business either by itself or through corporations owned or controlled by the State to the exclusion of private citizens, wholly or in part. One of the questions raised was whether the amendment of the Constitution could be invoked to validate the earlier legislation. The Court held that the Act when passed was unconstitutional and, therefore, it was still-born and could not be vitalised by the subsequent amendment of the Constitution removing the constitutional objections, but must be re-enacted. At page 728, Mukherjea, J., as he then was, who delivered the judgment of the Court, has given the reasons for the said view:

"As Professor Cooley has stated in his work on Constitutional Limitations, (Vol. I, page 304 note.).

(1) (1955) 1 S.C.R. 707.

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'a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted.' We think that this is sound law and our conclusion is that the legislation in question which violates the fundamental right of the appellants under Article 19(1) (g) of the Constitution and is not shown to be protected by clause (6) of the Article, as it stood at the time of the enactment, must be held to be void under Article 13(2) of the Constitution."

This is a direct authority on the point, without a dissenting voice, and we are bound by it.

The decision given in *Bhikaji Narain's Case* (1) is strongly relied upon by the learned Advocate General in support of his contention. Shortly stated, the facts in that case were: Before the Constitution, the C. P. & Berar Motor Vehicles (Amendment) Act, 1947, (C. P. III of 1948), amended the Motor Vehicles Act, 1939, (Central Act IV of 1939), and conferred extensive powers on the Provincial Government including the power to create a monopoly of the motor transport business in its favour to the exclusion of all motor transport operators. It was contended by the affected parties that by reason of Art. 13(1) of the Constitution, the Act became void. On behalf of the State, it was argued that the Constitution (First Amendment) Act, 1951, and the Constitution (Fourth Amendment) Act, 1955, had the effect of removing the inconsistency and the Amendment Act III of 1948 became operative again. This Court unanimously accepted the contention of the State. This decision is one given on a construction of Art. 13(1) of the Constitution and it is no authority on the construction and scope of Art. 13(2) of the Constitution. The

(1) (1955) 2 S.C.R. 589.

reason for the decision is found in the following passages in the judgment, at page 598:

" . . . on and after the commencement of the Constitution the existing law, as a result of its becoming inconsistent with the provisions of Article 19(1) (g), read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book . . . In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19(1) (g), read with clause (6) as it then stood, ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26th January, 1950, and 18th June, 1951, the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under Article 19(1) (g). The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. . . . The American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still-born as it were. . . . Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition."

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The aforesaid passages are only the re-statement of the law as enunciated in *Keshavan Madhava Menon's Case* (1), re-affirmed in *Pesikaka's Case* (2) and an extension of the same to meet a different situation. A pre-Constitution law, stating in the words of Das, J., as he then was, exists notwithstanding that it does not exist with respect to the future exercise of the fundamental rights. That principle has been extended in this decision, by invoking the doctrine of eclipse. As the law existed on the statute book to support pre-Constitution acts, the Court held that the said law was eclipsed for the time being by one or other of the fundamental rights and when the shadow was removed by the amendment of the Constitution, the impugned Act became free from all blemish or infirmity. The Legislature was competent to make the law with which *Pesikaka's Case* (2) was concerned at the time it was made. It was not a case of want of legislative power at the time the Act was passed, but one where in the case of a valid law supervening circumstances cast a cloud. To the other class of cases to which Art. 13(2) will apply, the views expressed by the American authorities, by MAHAJAN, J., as he then was in *Pesikaka's Case* (2) and by MUKHERJEA, J., as he then was, in *Saghir Ahmad's Case* (3), directly apply. To the facts in *Bhikaji Narain's Case* (4) the principle laid down in *Keshavan Madhava Menon's Case* (1) is attracted. But it is said that the observations of the learned Judges are wide enough to cover the case falling under Art. 13(2) of the Constitution and further that a logical extension of the principle laid down would take in also a case falling under Art. 13(2). The first contention is based upon the following passage:

"But apart from this distinction between pre-Constitution and post-Constitution laws, on which, however, we need not rest our decision, it must be

(1) 1951 S.C.R. 228.

(2) (1955) 1 S.C.R. 707.

(3) (1955) 1 S.C.R. 613.

(4) (1955) 2 S.C.R. 584.

held that these American authorities could have no application to our Constitution. All laws existing or future which are inconsistent with the provisions of Part III of our Constitution, are by express provisions of Article 13 rendered void to the extent of such inconsistency. Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition."

The first part of the said observation states nothing more than the plain import of the provisions of Art. 13(1) and (2), namely, that they render laws void only to the extent of such inconsistency.' The second part of the observation directly applies only to a case covered by Art. 13(1), for the learned Judges say that the laws exist for the purposes of pre-Constitution rights and liabilities and they remain operative even after the Constitution as against non-citizens. The said observation could not obviously apply to post-Constitution laws. Even so, it is said that by a parity of reasoning the post-Constitution laws are also void to the extent of their repugnancy and, therefore, the law in respect of non-citizens will be on the statute book and by the application of the doctrine of eclipse, the same result should flow in its case also. There is some plausibility in this argument, but it ignores one vital principle, viz., the existence or the non-existence of legislative power or competency at the time the law is made governs the situation. There is no scope for applying the doctrine of eclipse to a case where the law is void *ab initio* in whole or in part. That apart, in the present case—we do not base our decision on that—Art. 13(1) infringed by the Act, applies to all persons irrespective of whether

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they are citizens or non-citizens, and, therefore, the entire law was void *ab initio*. The judgment, therefore, does not support the respondent as it has bearing only on the construction of Art. 13(1) of the Constitution.

In *Ram Chandra Palai v. State of Orissa* (1), this Court followed the decision in *Bhikaji Narain's Case* (2) in the case of a pre-Constitution Act. In *Pannalal Binraj v. Union of India* (3), BHAGWATI, J., quoted with approval the extract from *Keshavan Madhava Menon's Case* (4), wherein it was held that Art. 13(1) has only the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory or devoid of any legal force or binding effect only with respect to the fundamental rights on or after the commencement of the Constitution.

The learned Advocate General relied upon certain decisions in support of his contention that the word "void" in Art. 13(1) and 13(2) means only "unenforceable" against persons claiming fundamental rights, and the law continues to be in the statute book irrespective of the fact that it was made in infringement of the fundamental rights. The observations of Mukherjea, J., as he then was, in *Chiranjit Lal Chowdhuri v. The Union of India* (5) are relied on and they are:

"Article 32, as its provisions show, is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for such enforcement arises out of an action of the executive or of the legislature. . . . The rights that could be enforced under Article 32 must ordinarily be the rights of the petitioner himself who complains of infraction of such rights and approaches the Court for relief."

(1) 1956 S.C.R. 28.

(2) (1955) 2 S.C.R. 589.

(3) 1957 S.C.R. 233.

(4) 1951 S.C.R. 228.

(5) 1950 S.C.R. 869, 899.

He also relied upon the decision of Das, J., as he then was, in *The State of Ma'ras v. Srimathi Champakam Dorairajan* (1), wherein the learned Judge states thus, at page 531 :

"The directive principles of the State Policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32."

Basing his argument on the aforesaid two observations, it is contended that in the case of both the directive principles and the fundamental rights, it must be held that the infringement of either does not invalidate the law, but only makes the law unenforceable. This argument, if we may say so, mixes up the Constitutional invalidity of a statute with the procedure to be followed to enforce the fundamental rights of an individual. The Constitutional validity of a statute depends upon the existence of legislative power in the State and the right of a person to approach the Supreme Court depends upon his possessing the fundamental right, i.e., he cannot apply for the enforcement of his right unless it is infringed by any law. The cases already considered supra clearly establish that a law, whether pre-Constitution or post-Constitution, would be void and nugatory in so far as it infringed the fundamental rights. We do not see any relevancy in the reference to the directive principles; for, the legislative power of a State is only guided by the directive principles of State Policy. The directions, even if disobeyed by the State, cannot affect the legislative power of the State, as they are only directory in scope and operation. The result of the aforesaid discussion may be summarized in the following proposi-

(1) 1951 S.C.R. 525.

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tions: (i) whether the Constitution affirmatively confers power on the legislature to make laws subject-wise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power; (ii) the Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution; (iii) it follows from the premises that a law made in derogation or in excess of that power would be *ab initio* void wholly or to the extent of the contravention as the case may be; and (iv) the doctrine of eclipse can be invoked only in the case of a law valid when made, but a shadow is cast on it by supervening constitutional inconsistency or supervening existing statutory inconsistency; when the shadow is removed, the impugned Act is freed from all blemish or infirmity. Applying the aforesaid principles to the present case, we hold that the validity of the Act could not be tested on the basis of the Constitution (Fourth Amendment) Act, 1955, but only on the terms of the relevant Articles as they existed prior to the Amendment.

We shall now proceed to consider the first contention of Mr. Nambiar. He contends that the Motor Vehicles (Amendment) Act, (100 of 1956), passed by Parliament was wholly repugnant to the provisions of the U. P. Act and, therefore, the law became void under the provisions of Art. 254(1) of the Constitution, with the result that at the present time there is no valid law whereunder the State can prohibit the appellants exercising their fundamental right under the Constitution, namely, carrying on the business of motor transport.

Mr. Naunit Lal bases his case on the proviso to Art. 254(2) of the Constitution, rather than on cl. (1) thereof.



He contends that by reason of the Amending Act, the U. P. Act was repealed in *toto*; and because of section 68B, the operation of the provisions of the General Clauses Act saving things done under the repealed Act was excluded. The learned Advocate General attempted to meet the double attack by pressing on us to hold that there was no repugnancy at all between the provisions of the Central Act and the U. P. Act and, therefore, the U. P. Act had neither become void, nor was repealed by necessary implication by the Central Act. We shall now examine the provisions of Art. 254(1) and 254(2), Article 254:

“(1) If any provisions of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding

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to, amending, varying or repealing the law so made by the Legislature of the State."

Article 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualifies the exception. If there is repugnancy between the law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and the law made by the State shall, to the extent of such repugnancy, be void. Under cl. (2), if the Legislature of a State makes a provision repugnant to the provisions of the law made by Parliament, it would prevail if the legislation of the State received the assent of the President. Even in such a case, Parliament may subsequently either amend, vary or repeal the law made by the Legislature of a State. In the present case, the Uttar Pradesh Legislative Assembly, after obtaining the assent of the President on April 23, 1955, passed the U. P. Act. Parliament subsequently passed the Motor Vehicles (Amendment) Act, (100 of 1956). Therefore, both the clauses of Art. 254 would apply to the situation. The first question is whether the provisions of the Union law, i.e., the Motor Vehicles (Amendment) Act, (100 of 1956), are repugnant to the provisions of the U. P. Act, and if so, to what extent. Before we proceed to examine the provisions of the two Acts, it may be convenient to notice the law pertaining to the rule of repugnancy.

Nicholas in his Australian Constitution, 2nd Edition, page 303, refers to three tests of inconsistency or repugnancy:

"(1) There may be inconsistency in the actual terms of the competing statutes;

(2) Though there may be no direct conflict, a State law may be inoperative because the Common-

wealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."

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This Court in *Ch. Tika Ramji v. The State of Uttar Pradesh* (1) accepted the said three rules, among others, as useful guides to test the question of repugnancy. In *Zaverbhai Amaldas v. The State of Bombay* (2), this Court laid down a similar test. At page 807, it is stated:

"The principle embodied in section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State."

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

We shall now examine the provisions of both the Acts in some detail in order to ascertain the extent of the repugnancy between them. The Scheme of the U. P.

(1) 1956) S.C.R. 399.

(2) (1955) 1 S.C.R. 799.

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Act may be summarized thus: Under the U. P. Act "State Road Transport service" is defined to mean transport service by a public service vehicle owned by the State Government. Under s. 3:

"Where the State Government is of the opinion that it is necessary in the interests of the general public and for subserving the common good, or for maintaining and developing efficient road transport system so to direct, it may, by notification in the official *Gazette*, declare that the road transport services in general, or any particular class of such service on any route or portion thereof as may be specified, shall be run and operated exclusively by the State Government, or by the State Government in conjunction with railways or be run and operated partly by the State Government and partly by others under and in accordance with the provisions of the Act."

After the publication of the notification under s. 3, the State Government or, if the State Government so directs, the Transport Commissioner publishes in such manner as may be specified a scheme as to the State Road Transport Service providing for all or any of the matters enumerated in cl. (2) of s. 4. Clause (2) of s. 4 directs that, among others, the scheme should provide the particulars of the routes or portions thereof over which and the date on which the State Transport Service will commence to operate, the roads in regard to which private persons may be allowed to operate upon, the routes that will be served by the State Government in conjunction with railways, the curtailment of the routes covered by the existing permits or transfer of the permits to other route or routes. Section 5 enjoins the Transport Commissioner to give notice to the permit-holder requiring him to lodge a statement in writing whether he agrees to the transfer of the permit and in cl. (2) thereof, it

is prescribed that in case he accepts the transfer, he is not entitled to any compensation, but if he does not agree to the transfer, his permit will be cancelled subject to his right to get compensation under the Act. Under s. 6 any person whose interests are affected may, within 30 days from the publication of the scheme, file objections on it before the Transport Commissioner who shall forward them to the Board constituted under s. 7, consisting of the Commissioner of a Division, Secretary to Government in the Transport Department and the Transport Commissioner. The Board shall consider the objections, if any, forwarded under s. 6 and may either confirm, modify or alter the scheme. The scheme so confirmed or modified or altered under s. 7 shall be published in the official *Gazette*. Any scheme published under s. 8 may at any time be cancelled or modified or altered by the State Government. Section 10 gives the consequences of the publication under s. 8. Section 11 provides compensation for premature cancellation of permits or curtailment of route or routes, as may be determined in accordance with the principles specified in Schedule I. In Schedule I, compensation is payable as follows:

(1) For every complete month or part of a month exceeding fifteen days of the unexpired period of the permit.

Rupees one hundred.

(2) For part of a month not exceeding fifteen days of the unexpired period of a permit.

Rupees fifty.

Provided always that the amount of compensation shall in no case be less than rupees two hundred.

Section 12 authorises the State Government, in a case where the permit has been cancelled, to purchase the motor vehicle covered by it if the holder of the permit offers to sell, upon terms and conditions laid down in

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Schedule II provided the vehicle is of the type of manufacture and model notified by the State Government and provided secondly that the vehicle is mechanically in a sound condition or otherwise declared fit by the Transport Commissioner or his nominee. Sections 13 to 18 provide for a State Machinery for the development of motor transport industry. Sections 19 to 22 are provisions which are consequential in nature. Shortly stated, under the U. P. Act the State Government initiate a scheme providing for the nationalization of the road transport in whole or in part; the objections filed by the persons affected by the scheme are heard by a Board of three officers appointed by the State Government; the Board after hearing the objections may confirm, modify or alter the scheme; the scheme so confirmed may be cancelled, modified or altered by the State Government by following the same procedure adopted for framing the original scheme; and the holders of permits cancelled may be given new permits if they choose to accept and, if not, they will be paid such compensation as prescribed under the Act. Under the Amendment Act 100 of 1956, whereby a new chapter was inserted in the Motor Vehicles Act of 1939, the procedure prescribed is different. Under s. 68-A of that Act, 'State Transport Undertaking' is defined to mean any undertaking providing road transport service, where such undertaking is carried on by,—(i) the Central Government or a State Government; (ii) any Road Transport Corporation established under s. 3 of the Road Transport Corporation Act, 1950; (iii) the Delhi Transport Authority established under s. 3 of the Delhi Road Transport Authority Act, 1950; and (iv) any municipality or any corporation or company owned or controlled by the State Government. Under s. 68-C, the State Transport Undertaking initiates a scheme if it is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in

the public interest that road transport service in general, or any particular class of such service, in relation to any area or route or portion thereof, should be run and operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons, or otherwise. Section 68-D says that any person affected by the scheme may file objections to the said scheme before the State Government; the State Government may, after considering the objections and after giving an opportunity to the objectors or their representatives and the representatives of the State Transport Undertaking to be heard in the matter, approve or modify the scheme. Any scheme published may at any time be cancelled or modified by the State Transport Undertaking following the same procedure; for the purpose of giving effect to the scheme, the Regional Transport Authority, *inter alia*, may cancel the existing permits or modify the terms of the existing permits. Section 68-G lays down the principles and method of determination of compensation. Under that section compensation is payable for every completed month or part of a month exceeding fifteen days of the unexpired period of the permits at Rs.200, and for part of a month not exceeding fifteen days of the unexpired period of the permit at Rs.100. Under the Amending Act, the gist of the provisions is that the schemes initiated by the State Transport Undertaking carried on by any of the four institutions mentioned in s. 68-A, including the State Government; objections are filed by the affected parties to the scheme, the affected parties and the Undertaking are heard by the State Government, which, after hearing the objections, approves or modifies the scheme. There is no provision for transfer of permits to some other routes, or for the purchase of the buses by the State Government. Compensation payable is twice that fixed under the U. P. Act. One important thing to be noticed is that the U. P. Act is prospective,

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i.e., comes into force only from the date of the passing of the Amending Act and the procedure prescribed applies only to schemes that are initiated under the provisions of the U. P. Act.

A comparison of the aforesaid provisions of the U. P. Act and the Amending Act indicates that both the Acts are intended to operate in respect of the same subject matter in the same field. The unamended Motor Vehicles Act of 1939 did not make any provision for the nationalization of transport services, but the States introduced amendments to implement the scheme of nationalization of road transport. Presumably, Parliament with a view to introduce a uniform law throughout the country avoiding defects found in practice passed the Amending Act inserting Chapter IV-A in the Motor Vehicles Act, 1939. This object would be frustrated if the argument that both the U. P. Act and the Amending Act should co-exist in respect of schemes to be framed after the Amending Act, is accepted. Further the authority to initiate the scheme, the manner of doing it, the authority to hear the objections, the principles regarding payment of compensation under the two Acts differ in important details from one another. While in the U. P. Act the scheme is initiated by the State Government, in the Amendment Act it is proposed by the State Transport Undertaking. The fact that a particular undertaking may be carried on by the State Government also cannot be a reason to equate the undertaking with the State Government; for under s. 68-A the undertaking may be carried on not only by the State Government but by five other different institutions. The undertaking is made a statutory authority under the Amending Act with a right to initiate the scheme and to be heard by the State Government in regard to objections filed by the persons affected by the scheme. While in the U. P. Act a Board hears the ob-



jections, under the Amending Act the State Government decides the disputes. The provisions of the scheme, the principles of compensation and the manner of its payment also differ in the two Acts. It is, therefore, manifest that the Amending Act occupies the same field in respect of the schemes initiated after the Amending Act and, therefore, to that extent the State Act must yield its place to the Central Act. But the same cannot be said of the schemes framed under the U. P. Act before the Amending Act came into force. Under Art. 254(1) "the law made by Parliament, whether passed before or after the law made by the Legislature of such State. . . shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

*Mr. Nambiar* contends that, as the U. P. Act and the Amending Act operate in the same field in respect of the same subject matter, i.e., the nationalization of bus transport, the U. P. Act becomes void under Art. 254(1) of the Constitution. This argument ignores the crucial words "to the extent of the repugnancy" in the said clause. What is void is not the entire Act but only to the extent of its repugnancy with the law made by Parliament. The identity of the field may relate to the pith and substance of the subject matter and also the period of its operation. When both coincide, the repugnancy is complete and the whole of the State Act becomes void. The operation of the Union Law may be entirely prospective leaving the State Law to be effective in regard to thing already done. Sections 68-C, 68-D and 68-E, inserted by the Amending Act, clearly show that those sections are concerned only with a scheme initiated after the Amending Act came into force. None of the sections, either expressly or by necessary implication, indicates that the schemes already

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finalised should be re-opened and fresh schemes be framed pursuant to the procedure prescribed thereunder. Therefore, under Art. 254(1), the law under the U. P. Act subsists to support the schemes framed thereunder and it becomes void only in respect of schemes framed under the Central Act. A similar question arose in the context of the application of Art. 13(1) to a pre-Constitution law which infringed the fundamental rights given under the Constitution.

In *Keshavan Madhava Menon's Case* (1) which we have referred to in a different context, the question was whether Indian Press (Emergency Powers) Act, 1931, was void as infringing the provisions of Art. 13(1) of the Constitution; and the Court held that the said Act was valid and would continue to be in force to sustain a prosecution launched for an act done before the Constitution. In the words of Das, J., as he then was:

"Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution." (p. 234).

"So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights." (pp. 235-236).

Article 13(1), so far as it is relevant to the present inquiry, is *pari materia* with the provisions of Art. 254(1) of the Constitution. While under Art. 13(1) all the pre-Constitution laws, to the extent of their inconsistency with the provisions of Part III, are void, under Art. 254(1) the State Law to the extent of its repugnancy to the law made by Parliament is void. If the pre-Constitution law exists for the post-Constitution period for all the past transactions, by the same parity of reasoning, the State law subsists after the making of the law by Parliament, for past transactions. In this view, both the laws can co-exist to operate during different periods.

(1) 1951 S.C.R. 228.

The same decision also affords a solution to the question mooted, namely, whether if the law was void all the completed transactions fall with it. MAHAJAN, J., as he then was, draws a distinction between a void Act and a repealed Act vis-a-vis their impact on past transactions. At page 251, the learned Judge says:

"The expression 'void' has no larger effect on the statute so declared than the word 'repeal'. The expression 'repeal' according to common law rule obliterates a statute completely as if it had never been passed and thus operates retrospectively on past transactions in the absence of a saving clause or in the absence of provisions such as are contained in the Interpretation Act, 1889, or in the General Clauses Act, 1897, while a provision in a statute that with effect from a particular date an existing law would be void to the extent of the repugnancy has no such retrospective operation and cannot affect pending prosecutions or actions taken under such laws. There is in such a situation no necessity of introducing a saving clause and it does not need the aid of a legislative provision of the nature contained in the Interpretation Act or the General Clauses Act. To hold that a prospective declaration that a statute is void affects pending cases is to give it indirectly retrospective operation and that result is repugnant to the clear phraseology employed in the various Articles in Part III of the Constitution."

The said observation directly applies to a situation created by Art. 254(1). As the U. P. Act was void from the date of the Amending Act, actions taken before that date cannot be affected. In whichever way it is looked at, we are satisfied that in the present case, the scheme already framed subsists and the State law exists to sustain it even after the Parliament made the law. In this

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view we reject the contention of *Mr. Nambiar* based on Art. 254(1) of the Constitution.

The alternative argument advanced by *Mr. Narain Lal* may now be considered. It is not disputed that under the proviso to Art. 254(2), the Parliament can repeal the law made by the Legislature of a State and that Parliament can repeal the repugnant State law whether directly or by necessary implication. Assuming that Parliament in the present case by enacting the Amending Act repugnant to the State law with respect to the same subject matter, i.e., nationalization of road transport, impliedly repealed the State law, would it have the effect of effacing the scheme already made? If there was a repeal, the provisions of s. 6 of the General Clauses Act of 1897 are directly attracted. The relevant part of s. 6 of the General Clauses Act reads:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder."

The express words used in clause (b) certainly take in the scheme framed under the repealed Act. It was a thing duly done under the repealed Act. But it is said that a comparison of the provisions of s. 6 with those of s. 24 would indicate that anything duly done excludes the scheme. Section 24 deals with the continuation of orders, schemes, rules, forms or bye-laws, made or issued under the repealed Act. But that section applies only to the repeal of a Central Act but not a

State Act. But the exclusion of the scheme is sought to be supported on the basis of the argument that in the case of a repeal of a Central Act, both the sections apply and, in that context, a reasonable interpretation would be to exclude what is specifically provided for from the general words used in s. 6. Whatever justification there may be in that context, there is none when we are concerned with the repeal of a State Act to which s. 24 does not apply. In that situation, we have to look to the plain words of s. 6 and ascertain whether those words are comprehensive enough to take in a scheme already framed. We have no doubt that a scheme framed is a thing done under the repealed Act.

A further contention is raised on the basis of the provisions of s. 68-B to achieve the same result, namely, that the said section indicates a different intention within the meaning of s. 6 of the General Clauses Act. Section 68-B reads:

"The provisions of this Chapter and rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in Chapter IV of this Act or in any other law for the time being in force or in any instrument having effect by virtue of any such law."

This section embodies nothing more than the bare statement that the provisions of this Act should prevail notwithstanding the fact that they are inconsistent with any other law. We have expressed our view that the provisions of this Act are prospective in operation and, therefore, nothing in those sections, which we have already analysed, is inconsistent with the provisions of the State law in regard to its operation with respect to transactions completed thereunder. Assuming without deciding that the word 'instrument' in s. 68-B includes a scheme, we do not see any provisions in the Act, which are inconsistent with the scheme framed under the State

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Act. The provisions starting from s. 68-C only contemplate a scheme initiated after the Amending Act came into force and, therefore, they cannot obviously be inconsistent with a scheme already framed under the State Act before the Amending Act came into force. We, therefore, hold that s. 6 of the General Clauses Act saves the scheme framed under the U. P. Act.

The next contention of the learned counsel *Mr. Nambiar*, namely, that the scheme being a prescription for the future, it has a continuous operation even after the Amending Act became law, with the result that after the Amending Act, there was no valid law to sustain it, need not detain us; for, we have held that the State law subsists even after the Amending Act to sustain the things done under the former Act.

This leads us to the contention of the learned Advocate General that even if the Constitution (Fourth Amendment) Act, 1955, could not be relied on to sustain the validity of the U. P. Act, there was no deprivation of property of the appellants within the meaning of the decisions of this Court in *The State of West Bengal v. Subodh Gopal Bose* (1); *Dwarkanadas Shrinivas of Bombay v. The Sholapur Spinning & Weaving Co., Ltd.* (2) and *Saghir Ahmad's Case* (3). Those cases have held that cls. (1) and (2) of Art. 31 relate to the same subject matter and that, though there is no actual transfer of property to the State, if by the Act of the State, an individual has been substantially dispossessed or where his right to use and enjoy his property has been seriously impaired or the value of the property has been materially reduced, it would be acquisition or taking possession within the meaning of cl. (2) of the said Article. After a faint attempt to raise this question, the learned Advocate General conceded that in view of the decision in *Saghir Ahmad's Case* (3) he could

(1) 1954 S.C.R. 587.

(2) 1954 S.C.R. 674.

(3) (1955) 1 S.C.R. 707.

not support his argument to the effect that the State did not deprive the petitioners of their interest in a commercial undertaking. In the said case, this Court held in express terms that U. P. Transport Act, 1951, which in effect prohibited the petitioners therein from doing their motor transport business deprived them of their property or interest in a commercial undertaking within the meaning of Art. 31(2) of the Constitution. MUKHERJEA, J., as he then was, observed at page 728:

"It is not seriously disputed on behalf of the respondents that the appellants' right to ply motor vehicles for gain is, in any event, an interest in a commercial undertaking. There is no doubt also that the appellants have been deprived of this interest."

The learned Judge proceeded to state at page 729:

"In view of that majority decision it must be taken to be settled now that clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2). The learned Advocate General conceded this to be the true legal position after the pronouncements of this Court referred to above. The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think, therefore, that in these circumstances the

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legislation does conflict with the provisions of Article 31(2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground."

The above observations are clear and unambiguous and they do not give scope for further argument on the subject. It follows that if the Act does not provide for compensation, the Act would be invalid being in conflict with the provisions of Art. 31(2) of the Constitution.

The next question is whether in fact the provisions of Art. 31(2) of the Constitution, before the Constitution (Fourth Amendment) Act, 1955, were complied with. Under Art. 31(2) no property shall be taken possession of or acquired save for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given. In *The State of West Bengal v. Mrs. Bela Banerjee* (1), PATANJALI SASTRI, C. J., has defined the meaning of the word 'compensation' at page 563, as under:

"While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount pay-

(1) 1954 S.C.R. 558.



able. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed."

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On the basis of the aforesaid principle, Mr. Nambiar contends that the U. P. Act does not provide for compensation in the sense of giving the operator deprived of his interest a just equivalent of what he has been deprived of, or fix any principles to guide the determination of the amount payable. The U. P. Act, the argument proceeds, does not provide at all for compensation payable in respect of the interest of the operator in a commercial undertaking, but only gives compensation for the unexpired period of the permit. On the other hand, the learned Advocate General contends that the appellants would be entitled only to just equivalent of the interest that they are deprived of, namely, the interest in a commercial undertaking and that the cumulative effect of the provisions of the U. P. Act is that a just equivalent of the said interest is given. As it is common case that what the Act should give is just compensation for the interest of the operator in a commercial undertaking, we shall now examine the provisions of the U. P. Act to ascertain whether it provides a *quid pro quo* for the interest the operator is deprived of.

The provisions of the U. P. Act relating to compensation may usefully be read at this stage :

Section 5: "(1) Where the scheme published under section 4 provides for cancellation of any existing permit granted under Chapter IV of the Motor Vehicles Act, 1939, or for the transfer of such permit to any other route or routes, the Transport Commissioner shall cause notice thereof to be served on the permit-holder concerned and on any other persons to whom in his opi-

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nion special notice should be given. The notice shall also require the permit-holder to lodge a statement in writing within the period to be specified therein whether he agrees to the transfer of the permit.

(2) If the permit-holder agrees to the transfer of his permit, he shall, provided the permit is actually so transferred ultimately, be not entitled to claim compensation under section 11 but the transference of the permit shall be deemed to be in lieu of compensation and complete discharge therefor of the State Government. Where, however, the permit-holder does not agree to the transfer, the permit shall, without prejudice to the right of the permit-holder to get compensation under the said section, be liable to be cancelled."

*Section 11:* "(1) Where in pursuance of the Scheme published under section 8 any existing permit granted under Chapter IV of the Motor Vehicles Act, 1939, is or is deemed to have been cancelled or the route or routes covered by it are curtailed or are deemed to have been curtailed, the permit-holder shall, except in cases where transfer of the permit has been agreed to under sub-section (2) of section 5, be entitled to receive and be paid such compensation by the State Government for and in respect of the premature cancellation of the permit or, as the case may be, for curtailment of the route or routes covered by the permit as may be determined in accordance with the principles specified in Schedule I.

(2) The compensation payable under this section shall be due as from the date of order of cancellation of the permit or curtailment of the route covered by the permit.

(3) There shall be paid by the State Government on the amount of compensation determined under sub-section (1) interest at the rate of two and one-half per cent from the date of order of cancellation or curtailment of

route to the date of determination of compensation as aforesaid.

(4) The compensation payable under this section shall be given in cash.

(5) The amount of compensation to be given in accordance with the provisions of sub-section (1) shall be determined by the Transport Commissioner and shall be offered to the permit-holder in full satisfaction of the compensation payable under this Act and if the amount so offered is not acceptable to the permit-holder, the Transport Commissioner may, within such time and in such manner as may be prescribed, refer the matter to the District Judge whose decision in the matter shall be final and shall not be called in question in any Court."

*Section 12:* "Where a permit granted under Chapter IV of the Motor Vehicles Act, 1939, has been cancelled or the route to which the permit relates has been curtailed in pursuance of the scheme published under section 8, the State Government may, if the holder of the permit offers to sell, choose to purchase the motor vehicles covered by the permit upon terms and conditions laid down in Schedule II:

Provided, firstly, that the vehicle is of a type, manufacture and model notified by the State Government; and

Provided, secondly, that the vehicle is in a mechanically sound condition and is otherwise declared fit by the Transport Commissioner or his nominee."

#### SCHEDULE I

*Paragraph 1:* The compensation payable under section 11 of the Act for cancellation of a contract carriage or stage carriage or public carrier's permit under clause (c) of sub-section (1) of section 10 of the Act shall be

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computed for every vehicle covered by the permit as follows, namely:

(1) For every complete month	Rupees
or part of a month exceeding	one
fifteen days of the unexpired	hundred
period of the permit.	

(2) For part of a month not	Rupees
exceeding fifteen days of the	fifty
unexpired period of a permit.	

Provided always that the amount of compensation shall in no case be less than rupees two hundred.

*Paragraph 2:* The compensation payable under section 11 for curtailment of the route or routes covered by a stage carriage or public carrier permit under clause (d) of sub-section (1) of section 10 of the Act shall be an amount computed in accordance with the following formula:

$$\frac{Y \times A}{R}$$

In this formula—

Y means the length in mile by which the route is curtailed.

A means the amount computed in accordance with paragraph 1 above.

R means the total length in miles of the route covered by the permit."

The aforesaid provisions constitute an integrated scheme for paying compensation to the person whose permit is cancelled. The gist of the provisions may be stated thus: The scheme made by the State Government may provide for the cancellation of a permit, for curtailment of the route or routes or for transfer of the

permit to other routes. Where a transfer of the permit is accepted by the operator, he will not be entitled to any compensation; if he does not accept, compensation will be paid to him with interest in respect of the premature cancellation of the permit, or, as the case may be, for the curtailment of the route or routes covered by the permit. The amount of compensation to be given shall be determined by the Transport Commissioner in accordance with the provisions of the Act, and if the amount so offered is not acceptable to the permit-holder, the Transport Commissioner may, within such time and in such manner as may be prescribed, refer the matter to the District Judge whose decision in the matter shall be final. There is also a provision enabling the Government to purchase the motor vehicles covered by the permit, if the holder of the permit offers to sell and if the vehicles satisfy the specifications laid down in the Act. The question is whether these provisions offer a *quid pro quo* for the interest of the petitioners in the commercial undertaking, i.e., business in motor transport. Let us examine the question from the standpoint of a business deal. If the transport business is sold, the seller gets his value for the assets *minus* the liabilities and for his goodwill. In the case of a scheme framed under the Act, the assets are left with the holder of the permit and under certain conditions the State purchases them. As the scheme is a phased one, it cannot be said, though there will be difficulties, that the assets cannot be sold to other operators. If a permit is not cancelled but only transferred to another route, it may be assumed that if the transfer is voluntarily accepted by the permit-holder, he is satisfied that the route given to him is as good as that on which he was doing his business. On the other hand, if he chooses to reject the transfer of his permit to another route and takes compensation, the question is whether the compensation provided by s. 11 is anything like an equivalent

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or *quid pro quo* for the interest in the commercial undertaking acquired by the State. If cl. (5) of s. 11 had not been there, we would have had no hesitation to hold that a flat rate of Rs.100 or less irrespective of the real loss to the holder would not be compensation within the meaning of Art. 31(2). But, in our view, s. 11(5) gives a different complexion to the entire question of compensation. Under that clause, a permit-holder aggrieved by the amount of compensation given by the Transport Commissioner may ask for referring the matter to the District Judge for his decision in regard to the adequacy of the compensation. This clause is susceptible of both a strict as well as a liberal interpretation. If it is strictly construed, it may be held that what the District Judge can give as compensation is only that which the Transport Commissioner can, under the provisions of s. 11(1), i.e., at the rates mentioned in the Schedule. But a liberal interpretation, as contended by the learned Advocate General, can be given to that clause without doing violence to the language used therein and that interpretation will carry out the intention of the legislature. If the jurisdiction of the District Judge relates only to the calculation of figures, the said clause becomes meaningless in the present context. Section 11 read with the Schedule gives the rate of compensation, the rate of interest, the dates from which and up to which the said compensation is to be paid with interest. The duty of calculating the said amount is entrusted to the Transport Commissioner, who will be a fairly senior officer of the Government. If he made any mistake in mere calculations, he would certainly correct it if the permit-holder pointed out the mistake to him. In the circumstances, is it reasonable to assume that the legislature gave a remedy for the permit-holder to approach the District Judge for the mere correction of the calculated figures? It is more reasonable to assume that the intention of the legis-

lature was to provide *prima facie* for compensation at flat rate and realising the inadequacy of the rule of thumb to meet varying situations, it entrusted the duty of the final determination of compensation to a judicial officer of the rank of a District Judge. The provisions of s. 11(5), in our view, are certainly susceptible of such an interpretation as to carry out the intention of the legislature indicated by the general scheme of the provisions. The crucial words are "if the amount so offered is not acceptable to the permit-holder". The amount offered is no doubt the amount calculated in accordance with s. 11(1). But a duty is cast on the Transport Commissioner to refer the matter to the District Judge if the amount offered is not *acceptable* to the permit-holder. The word "acceptable" is of very wide connotation and it does not limit the objection only to the wrong calculation under s. 11(1). The permit-holder may not accept the amount on the ground that compensation offered is inadequate and is not a *quid pro quo* for the interest of which he is deprived. It is, therefore, for the District Judge, on the evidence adduced by both the parties, to decide the proper compensation to be paid to him in respect of the right of which he is deprived by the cancellation of the permit. The language of s. 11(5) not only bears the aforesaid construction but also carries out the intention of the legislature, for it cannot be imputed to the legislature that it intended to deprive a valuable interest by giving a nominal amount to the permit-holder.

Section 11(5) speaks of the time limit within which such reference may be made to the District Judge, but no such rule has been brought to our notice. We hope and trust that, without standing on any such technicality, the Transport Commissioner, if so required, will refer the matter of compensation to the District Judge. Having regard to the entire scheme of com-

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pensation provided by the Act, we hold that the Act provided for adequate compensation for the interest acquired within the meaning of Art. 31(1) of the Constitution.

It is said that out of the twenty-five appeals appellants in thirteen appeals had accepted to take a transfer of the permits to different routes; but on behalf of the appellants it is denied that the acceptance was unequivocal and final. They say that it was conditional and that, as a matter of fact, they have not been plying the buses on the transferred routes and, indeed, have been operating them only on the old routes. In these circumstances, we cannot hold that the said appellants accepted the alternative routes. If they or some of them choose to accept any alternative routes, they are at liberty to do so, in which event they will not be entitled to any compensation.

Lastly, the learned counsel for the appellants contends that cl. (2) of s. 3 of the U. P. Act infringes their fundamental rights under Art. 31(2) inasmuch as it prevents them from questioning the validity of the scheme on the ground that it is not for public purpose. *Section 3 reads:*

"(1) Where the State Government is of the opinion that it is necessary in the interest of the general public and for subserving the common good, or for maintaining and developing efficient road transport system so to direct, it may, by notification in the official Gazette, declare that the road transport services in general, or any particular class of such service, on any route or portion thereof as may be specified, shall be run and operated exclusively by the State Government, or by the State Government in conjunction with railways or be run and operated partly by the State Government and partly by



others under and in accordance with the provisions of this Act.

(2) The notification under sub-section (1) shall be conclusive evidence of the facts stated therein."

The argument of the learned counsel on the interpretation of this section appears to be an after-thought; for the records do not disclose that the appellants attempted to question the said fact before the Government and they were precluded from doing so on the basis of cl. (2) of s. (3). We are not, therefore, prepared to allow the appellants to raise the contention for the first time before us.

The last contention, which is special to Civil Appeal No. 429 of 1958, is that during the crucial period when the scheme of nationalization was put through, the appellant had no permit, it having been cancelled by the order of the appropriate tribunal; but subsequently, after the scheme was finalised, the said order was set aside by the Appellate Tribunal retrospectively and, therefore, the order of the State Government made behind the back of the appellant does not bind him. The appellant's permit was not renewed by the Regional Transport Authority. Against the said order, he preferred an appeal to the State Transport Tribunal, which by an order, dated September 6, 1956, allowed the appeal and directed that the appellant's permit be renewed for three years beginning from November 1, 1953. In disposing of the appeal, the State Transport Tribunal observed:

"We are told that in the meantime this route has been notified and the Government buses are plying on it. The effect of this order will be that the appellant shall be deemed to be in possession of a valid permit and he shall have to be displaced after following the usual procedure prescribed by the

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U. P. Road Transport Services (Development) Act."

Pursuant to their order, it appears that the Regional Transport Authority renewed his permit on October 11, 1956, with effect from November 1, 1953, to October 31, 1956. In the circumstances, as the petitioner was not a permit-holder when the Government made the order, no relief can be given to him in this appeal. This order will not preclude the appellant in Civil Appeal No. 429 of 1958, if he has any right, to take appropriate proceedings against the State Government.

In the result, all the appeals are dismissed with one set of costs to the State of Uttar Pradesh.

*Appeals dismissed.*

### APPELLATE CIVIL

*Before the Hon'ble O. H. Mootham, Chief Justice, and Mr. Justice Srivastava.*

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February, 3

SARJU PRASAD (APPELLANT)

v.

CIVIL JUDGE, FARRUKHABAD AND OTHERS  
(RESPONDENTS)

*Consolidation of holdidgs—Provision for arbitration under Award, whether appealable—Failure to avail of the right of appeal—Effect of, on petition for certiorari—Uttar Pradesh Consolidation of Holdings Act, 1954, ss. 12 and 37, r. 63—Arbitration Act, 1940 s. 39(1)—Constitution of India, 1950, Art. 226.*

The provision for arbitration under s. 12 of the Consolidation of Holdings Act is governed by the Arbitration Act, 1940, and accordingly an appeal lies against orders falling within the purview of s. 39(1) of the latter Act.

Thus, the order of the Civil Judge setting aside or refusing to set aside the award is appealable and the writ of *certiorari* for quashing the same cannot, therefore, be available to one who invokes the power of the High Court under Art. 226 of the Constitution without trying his remedy by way of appeal.

Special Appeal No. 69 of 1959 from a decision of JAGDISH SAHAI, J., dated 29th July, 1958, in Civil Miscellaneous Writ No. 1935 of 1958.

The facts appear in the judgment.

S. C. Khare for the appellant.

The standing counsel for the respondents.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This is an appeal against an order of Mr. JUSTICE JAGDISH SAHAI by which he rejected a petition filed by the appellant under Art. 226 of the Constitution.

It appears that prior to the coming into force of the Zamindari Abolition and Land Reforms Act, the appellant was an occupancy tenant of plot no. 208 of village Atrajpur, tahsil Chhibramau, district Farrukhabad. The respondent No. 3 was the sub-tenant of the plot on behalf of the appellant and was entered in the papers as *bila tasfia lagan*. A dispute arose between the parties in respect of possession over the plot, and after proceedings under s. 145 of the Code of Criminal Procedure had been started, the dispute was referred to arbitration. The arbitrator decided that the appellant should have possession over half of the plot and the respondent No. 3 should have the other half, and that respondent No. 3 should be treated as a tenant on behalf of the appellant in respect of that half. In spite of the award the dispute between the parties continued. Though the appellant claimed that respondent No. 3 had removed his possession from his half of the plot, the respondent No. 3 denied that fact. He claimed to have become the tenant of the entire plot on the ground that he had not actually been ejected from any portion of it and the suit for his ejectment from the appellant's half share had become time-barred. He filed a civil suit in the court of the Munsif claiming a declaration of his tenancy rights in respect of the plot. This suit was

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decreed by the trial court. While an appeal against the decree was pending consolidation proceedings were started in the village. An objection under section 12 of the Consolidation of Holdings Act was filed in respect of the plot and both the appellant and respondent No. 3 claimed to be entitled to it. This dispute was referred by the Assistant Consolidation Officer to the Civil Judge. The Civil Judge referred the matter to an Arbitrator for decision. The reference was made under section 12 of the Consolidation of Holdings Act. The Arbitrator submitted an award. It was remitted by the Civil Judge to him again as he had left one point undecided. The arbitrator submitted a modified award and held that respondent No. 3 had become *the sirdar* of the plot and the appellant was, therefore, not entitled to any portion of it. The appellant filed an objection against the award before the Civil Judge and wanted the award to be set aside. The Civil Judge, however, found that the award was a good one and, therefore, confirmed it and declared respondent No. 3 to be *sirdar* of the plot. The appellant then filed the writ petition out of which this appeal has arisen and wanted the award as well as the order of the Civil Judge refusing to set it aside to be quashed by a writ of *certiorari*. The learned Judge before whom the petition came up for hearing took the view that, because the decision of the Civil Judge was an appealable one, the appellant had an alternative remedy of filing an appeal against that decision before the District Judge. As he had not pursued that remedy, he could not, it was held, have recourse to Art. 226 of the Constitution. On that ground the learned Judge refused to interfere and dismissed the petition.

The appellant has now come up in Special appeal, and it is contended on his behalf that the learned Judge was not justified in his opinion that the decision of the Civil Judge was an appealable one. In fact, it is urged,

the appellant had no alternative remedy against that decision of the Civil Judge and could, therefore, apply under Art. 226 of the Constitution for the quashing of that order.

The only question that is to be decided in this appeal, therefore, is whether the order of the Civil Judge was really an appealable order.

It is stressed on behalf of the appellant that under clause (6) of section 12 of the Consolidation of Holdings Act the award of the Arbitrator was final, and if it was final there was no question of its being challenged in appeal. If the award was final, the decision of the Civil Judge upholding it was also final, and it was, therefore, not open to the appellant to challenge that order in appeal.

Clause (6) of section 12 of the Consolidation of Holdings Act cannot, however, be considered in isolation from the other provisions of the Act and the rules framed thereunder. It is true that by that clause the award of the Arbitrator is declared to be final, but it cannot be said on that ground that the award cannot be challenged in any manner. The obvious meaning of the word 'final' as used in cl. (6) of section 12 of the Consolidation of Holdings Act appears to be that the award will not be directly open to appeal or revision. If a reference is made to section 37 of the Act it will be found that that section clearly provides:

"Where any matter is, by or under this Act, directed to be referred to an Arbitrator for determination, the Arbitrator will be appointed by the State Government from amongst Civil Judicial Officers or Assistant Collectors of the 1st class of not less than five years' standing and in all other respect the matter shall be determined in accordance with the provisions of the Arbitration Act, 1940."

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Rules have also been framed under the Consolidation of Holdings Act, and r. 63 of the Rules provides in its sub-r. (7) that the Arbitrator shall after signing the award give notice in writing to the parties of the making and signing thereof. The record of the case shall thereafter be transmitted to the Civil Judge concerned after giving an intimation of the date on which the parties should appear before him, then sub-r. (8) lays down—

“On the date so fixed, or any subsequent date to which the proceedings might be adjourned, the Civil Judge shall, with or without modifications made by him in accordance with the provisions of section 15 of the Indian Arbitration Act, 1940, pronounce judgment in terms of the award, where he does not consider it necessary to remit the award, under section 16, or to set aside the same under section 30, of the aforesaid Act.”

This rule has apparently been framed with reference to section 37 of the Act, and, in spite of the fact that it was provided in clause (6) of section 12 of the Act that the award was final, the rule provides that the award will be liable to be modified, remitted or set aside under the various provisions of the Arbitration Act. It was, therefore, contemplated that objections could be filed against the award and could be considered by the Civil Judge. The Civil Judge could remit, modify or set aside the award under the provisions of the Arbitration Act only, on such objections being filed. As provided in section 37 of the Act, in all other respects the matter was to be determined in accordance with the provisions of the Arbitration Act. The whole of the Arbitration Act including section 39, therefore, became applicable. According to sub-s. (1) of that section an appeal could be filed against various orders of the court, including an order setting aside or refusing to set aside an award. In the present case the Civil

Judge, when an objection was made before him against the award, refused to set it aside. Under section 39 this order of his could be challenged in appeal. Learned counsel has not been able to satisfy us that section 39 of the Arbitration Act was not applicable to the case. The learned Judge dealing with the petition of the appellant was, therefore, quite justified in his view that the order of the Civil Judge which was sought to be impugned was an appealable order. The appellant thus had an alternative remedy. For reasons best known to him he did not pursue that remedy. On account of that omission he could not expect this Court to exercise in his favour its discretion under Art. 226 of the Constitution. It is true that the existence of an alternative remedy is not by itself an absolute bar to the exercise of its jurisdiction by this Court under Art. 226. It is, however, a matter to be taken into consideration while deciding whether the powers under the Article are to be exercised in a particular case. In the present case keeping in view the fact that an alternative remedy was open to the appellant but had not been followed by him, the learned Judge declined to interfere. We do not think he was unjustified in doing so.

We, therefore, find no merits in this appeal. It is accordingly dismissed.

*Appeal dismissed.*

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**(FULL BENCH) APPELLATE CIVIL**

*Before Mr. Justice Chaturvedi, Mr. Justice Tandon and  
Mr. Justice Nigam\**

**RANA SHEO AMBAR SINGH (APPELLANT)**

*v.*

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September 24

**THE ALLAHABAD BANK LTD., ALLAHABAD  
(RESPONDENT)**

**Execution of the Decree—Decree for sale—Mortgage—Zamindari Abolition—Application for sale of Groves—Sir and khudkasht rights—Groves—Bhumidhari rights—Sir and khudkasht rights, if subject to sale in execution of the Decree—Ancillary application, scope of Civil Procedure Code, 1908 s. 48, applicability of.**

An execution application for the sale of the mortgaged property filed on 25th May, 1940, was pending when the Uttar Pradesh Zamindari Abolition and Land Reforms Act, came into force. The decree-holder on 20th September, 1952 applied to the Sales Officer to whom the decree was sent for execution that the judgment-debtor's rights in the proprietary groves, *sir* and *khudkasht* be put to sale. The judgment-debtor opposed this application. The Sales Officer sent the case back for disposal to the Civil Court. The execution Court held that the *Bhumidhari* rights acquired by the judgment-debtor under s. 18 of the Zamindari Abolition and Land Reforms Act can be sold in execution of the decree.

On an appeal by the judgment-debtor:

*Held* (i) that the *sir* and *khudkasht* rights could not exist independently of the proprietary rights of the erstwhile zamindar and it is those very rights which have been continued with some modifications and are now called *bhumidhari* rights;

(ii) that the *bhumidhari* rights are transferable for all practical purposes and they having accrued because of the *sir* and *khudkasht* rights of the mortgagor in the mortgaged property, the *bhumidhari* rights continue to be subject to the mortgage as being part of the mortgaged property;

(iii) that the *bhumidari* rights in the *sir* and *khudkasht* lands and the proprietor's groves are subject to sale in execution of the mortgage decree also as substituted security assuming for the sake of arguments that these rights did not form part of the mortgaged property;

(iv) that the application dated the 20th September, 1952 was not a fresh application but an incidental or ancillary application made in connection with the pending execution case started

\*Sitting at Lucknow.



with the execution application of 25th May, 1940. This application is not barred by s. 48, Civil Procedure Code and no rule of limitation is applicable to such an ancillary application.

Execution First Appeal No. 8 of 1953 from a decree of Narendra Nath Mishra, Civil Judge, Rae Bareilly, dated 15th April, 1953.

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The facts appear in the judgment.

*Haidar Husain* and *H. N. Misra*, for the appellant.

*Iqbal Ahmad* and *Shiv Gopal*, for the respondent.

The judgment of the Court was delivered by—

CHATURVEDI, J.:—This is a judgment-debtor's appeal against an order dismissing his objections filed under section 47 of the Code of Civil Procedure. It appears necessary to give a short history of the case which begins as far back as the year 1914. Rana Sheoraj Bakhsh Singh was the proprietor and taluqdar of what was called Khajurgaon estate in the district of Rae Bareilly. He relinquished his rights in favour of Uma Nath Bakhsh Singh on the 9th May, 1913, and Uma Nath Bakhsh Singh became the proprietor and taluqdar of the estate. On the 13th July, 1914, Rana Uma Nath Bakhsh Singh executed a deed of simple mortgage in favour of the Allahabad Bank Ltd., decree-holder respondent. The mortgage was for a sum of Rs.6,00,000 and the mortgage money carried interest at the rate of seven per cent per annum compoundable six-monthly. Rana Uma Nath Bakhsh Singh mortgaged 67 villages under this deed. On the 23rd May, 1924 the respondent Bank filed a suit for recovery of the balance of the unpaid mortgage money by sale of the mortgaged property. On the 31st January, 1925, a preliminary decree for sale for the recovery of Rs.4,86,863-15-8 was passed. This decree was made final on the 16th July, 1926, and it directed the sale of the mortgaged property, namely the proprietary rights of Rana Uma Nath Bakhsh Singh in the 67 villages which had been mortgaged.

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The first application for execution was filed by the respondent on the 23rd September, 1926, but the parties entered into a compromise on the 15th March, 1928, whereby the decree was made payable in certain instalments and the rate of future interest was enhanced. The instalments were not paid and on the 20th April, 1931, the respondent filed a second application for execution. On the 4th February, 1932, execution proceedings were transferred to the Revenue Court and on the 19th April, 1932, a second compromise was arrived at between the parties. Fresh instalments were allowed to the judgment-debtor after slightly enhancing the future rate of interest though the past rate was somewhat reduced. Instalments were again not paid and the third application for execution was made on the 14th September, 1933. The execution proceedings were again transferred to the Collector on the 8th January, 1934. The U. P. Agriculturists' Relief Act of 1934 came into force soon after and the judgment-debtor applied for amendment of the decree under that Act. On the 19th October, 1936, an order was passed under the above Act permitting payment of the decretal amount in six-monthly instalments of Rs.20,000 each and the rate of interest was also reduced. Information of the amendment of the decree was sent to the Revenue Court on the 22nd December, 1936, and the Revenue Court returned the papers back to the Civil Court on the 12th January, 1937. On the 16th January, 1937, the Civil Court ordered that the papers be consigned to the record room. On another application filed by the judgment-debtor an order was passed on the 29th April, 1938, granting three years' time to the judgment-debtor for the payment of the decretal amount. The amount as usual was not paid and the fourth application for execution was filed on the 25th May, 1940. The Judgment-debtor filed objections to the execution and one of the objections was that the last application for execution was made

more than 12 years after the date of the decree and was consequently barred by time. The executing Court dismissed the objections and an appeal was filed before the Chief Court of Avadh by the judgment-debtor which was dismissed on the 13th April, 1944 (*vide Rana Uma Nath Bakhsh Singh v. Sheo Prasad Gupta*, (1) respondent in the connected appeal. The Chief Court held that the execution application was not barred by time, as the limitation would commence to run from the date of the amendment of the decree and it was quite immaterial for the purposes of limitation as to what happened prior to the amendment. An application for leave to appeal against the judgment of the Avadh Chief Court was filed but it was also dismissed (*vide Rana Uma Nath Bakhsh Singh v. The Allahabad Bank Ltd.*, (2). The decision of the Avadh Chief Court that the application for execution filed on the 25th May, 1940, was within limitation thus became final and binding on the parties. The learned counsel for the appellant has conceded that this is the position and has not contended that the application for execution, dated the 25th May, 1940, was barred by time.

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Proceedings continued for a number of years till on the 1st July, 1952, the U. P. Zamindari Abolition and Land Reforms Act (Act I of 1951), came into force. As a consequence of this enactment the zamindari rights of the judgment-debtor were abolished and it was no longer possible to sell the zamindari rights in the 67 villages which had been ordered to be sold. In the meantime Rana Uma Nath Bakhsh Singh died and was succeeded by his son Rana Sheo Ambar Singh, the appellant before us. In view of the altered situation created by the Zamindari Abolition and Land Reforms Act, an application was made by the decree-holder on the 20th September, 1952 to the Sales Officer to whom the decree

(1) 1944 O.W.N. 247.

(2) 1945 O.W.N. 51.

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had already been sent for execution. In this application it was alleged by the decree-holder that the rights of the judgment-debtor which were sought to be sold in execution included his transferable rights in trees, wells and buildings situate in the various villages under sale. Valuations of rights in trees, wells and buildings had been made at tehsils. The details of those rights which still existed in the judgment-debtor were given. They were rights in buildings belonging to the judgment-debtor and in trees and private wells situate in *abadi* and in the groves. It was further averred that the judgment-debtor's rights in the proprietary groves as well as in *sir* and *khudkasht* had been continued and were in partial substitution of the proprietary right acquired by the State. Compensation money payable to the judgment-debtor was also claimed as substituted security. It was prayed that steps be taken to ascertain the extent and valuation of the judgment-debtor's present transferable interest in the villages sought to be sold and to put such interest to sale. It was further prayed that orders be passed directing the Compensation Officers within whose jurisdiction the villages sought to be sold were situate to place at the disposal of the Court the compensation money payable to the judgment-debtor in respect of the villages previously sought to be sold. The judgment-debtor filed objections to this application on several grounds and the decree-holder respondent filed a replication on the 3rd November, 1952. The Sales Officer (Revenue Court) sent the case for disposal to the Civil Court. The execution Court heard the objections and dismissed them by the order under appeal dated the 15th April, 1953. It held that the houses, trees and wells situate in the *abadi* could be sold in execution of the decree and the decree-holder was further entitled to compensation bonds granted by the Government to the appellant in lieu of his zamindari rights, as substituted security. It also held that the

*bhumidhari* rights acquired by the appellant under section 18 of the Zamindari Abolition and Land Reforms Act could also be sold in execution of the decree. Hence the present appeal.

The appeal came up for hearing before a Division Bench on the 22nd November, 1957, and the Division Bench, in view of the importance of the questions raised in the appeal, directed the record of the case to be placed before the Hon'ble the Chief Justice for the constitution of a larger Bench. It referred the whole case to a larger Bench. The Chief Justice accordingly constituted the present Bench.

The learned Counsel for the appellant has not challenged the correctness of the decision of the executing Court that the houses, trees and wells situate in the mortgaged villages could be sold in execution of the decree. He has also not challenged the decision of the executing Court that the Zamindari Abolition Compensation Bonds should be handed over to the decreeholder respondent in execution of the decree, as they have been substituted in place of the Zamindari rights. He has not agrued ground no. 4 of the grounds of appeal that the decree-holder could not sell in execution proceedings the rights acquired by the judgment-debtor under the Zamindari Abolition and Land Reforms Act.

The learned Counsel has urged only two points before us, namely—

- (1) That only the proprietary rights of the judgment-debtor were mortgaged in the deed of the 13th July, 1914, and all those proprietary rights have now vested in the State of Uttar Pradesh. The *bhumidhari* rights that have been granted by the Zamindari Abolition and Land Reforms Act in the said villages are creation of a Statute and are quite independent of the proprietary rights of the judg-

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ment-debtor which were the subject-matter of the mortgage. Hence the *bhumidhari* rights acquired by the appellant in the 67 mortgaged villages could not be sold in execution of the decree.

(2) That the application dated the 20th September, 1952, was a fresh application for execution of the decree, and as it was filed more than 12 years after the date even of the amended decree, the application of the 20th September, 1952, was barred by time.

We now proceed to consider the points urged by the learned Counsel for the judgment-debtor appellant. The first three grounds of the grounds of appeal relate to the first point mentioned above. The learned Counsel for the appellant has stressed the fact that the appellant and his predecessors were taluqdars whose names were mentioned in lists I and II of the lists prepared under the Oudh Estates Act of 1869. The mortgaged rights were purely proprietary rights in the 67 villages and these rights were all abolished by the Zamindari Abolition and Land Reforms Act. A notification under section 4 of that Act was issued as a result of which the proprietary rights in all the villages vested in the State of Uttar Pradesh free from all encumbrances. The consequences of the order under section 4 are mentioned in section 6 of the Act which provides that when a notification under section 4 has been published in the *Gazette*, the consequence of the publication would *inter alia* be the abolition of all rights, title and interest of all the intermediaries, namely the zamindars and taluqdars. This consequence is to follow notwithstanding anything contained in any contract or document or any other law for the time being in force. It is argued that the entire mortgaged property has vested in the State of Uttar Pradesh and the *bhumidhari* rights have been granted by section 18 of the Act to the intermediaries who were in possession of or held *sir*, *khudkast* or a

zamindari grove. His contention is that this right is entirely a new tenure created by the Statute and is quite independent of the proprietary rights of the appellant in the 67 mortgaged villages before the Zamindari Abolition and Land Reforms Act came into force. He contends that though section 152 of the Act says that the interest of a *bhumidhar* shall be transferable, this right of transfer has been made subject to certain conditions mentioned in the Act itself. One of the conditions is contained in section 154 and it prohibits a *bhumidhar* from transferring by sale or gift any land to any person, other than an institution established for a charitable purpose, where such persons shall, as a result of the sale or gift, become entitled to land which together with the land held by him will, in the aggregate exceed 30 acres in Uttar Pradesh. The second limitation is contained in section 155, which prohibits a *bhumidhar* from executing a possessory mortgage in favour of anybody. There are certain limitations on the right of letting also contained in section 156. The *bhumidhar* has no right of free exchange but this right has also to be exercised subject to the proviso contained in section 161. Lastly, it is contended that even the line of succession has been changed and the successors in the *bhumdhari* rights will be those as mentioned in section 171 instead of those mentioned in the Oudh Estates Act. His contention is that the *sir* and *khudkasht* rights have completely disappeared and a new tenure has been created by the Zamindari Abolition and Land Reforms Act only the wells, trees in *abadi* and buildings situate within the limits of an estate continue to belong to the intermediary. He was consequently giving up his objection with respect to private wells, trees in *abadi* and buildings situate in the mortgaged villages.

The contention of the decree-holder respondent is that the previous *sir* and *khudkasht* rights of the Zamindari as well as his rights in the groves have been allowed

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to continue to vest in the zamindar and only a new nomenclature has been given to those rights. Instead of being called *sir* land, *khudkasht* land and the grove land of the erstwhile proprietor they are now called his *bhumidhari* rights in the same lands. They thus formed part of the mortgaged property. In the alternative, it is urged that the *bhumidhari* rights have been granted in substitution of the old proprietary rights and they are thus saleable by virtue of the doctrine of substituted security. It was lastly contended that, in any case, these rights have been carved out of the zamindari rights and have only replaced those rights and thus remain subject to the mortgage decree.

We think the contention of the learned Counsel for the decree-holder with respect to the first two submissions of his is correct. Section 4 of the Zamindari Abolition and Land Reforms Act says that all estates situate in Uttar Pradesh shall vest in the State of Uttar Pradesh from the date of the notification and all such estates shall stand transferred to and vest in the State free from all encumbrances "except as hereinafter provided."

Section 6 of the Act also uses a similar expression. It narrates the consequences of the vesting of an estate but it also says that the consequence mentioned in the section shall ensue "save as otherwise provided in this Act."

One of these saving provisions is contained in section 9 of the Act where private wells, trees in *abadi* and buildings have been directed to continue to belong to or be held by the intermediary and the site of the wells or the buildings with the area appurtenant thereto would be deemed to be settled with him by the State Government.

Section 18 of the Act contains a similar exception in respect of the *sir* and *khudkasht* lands and zamindar's groves of which the zamindar was in possession on the date of vesting or which were held by him on that date or should be deemed to have been held by him.



Section 18 has been made subject only to the provisions of sections 10, 15, 16 and 17 under which hereditary rights have been granted to tenants under certain circumstances. In such *sir* and *khudkasht* land the zamindar or intermediary does not get *bhumidhari* rights but he gets *bhumidhari* rights in all his *sir* and *khudkasht* lands and his groves of which he was in actual possession of or should be deemed to have been held by him. He is entitled to "take or retain possession" of such lands, as *bhumidhar*. The *sir* and *khudkasht* and the groves were obviously annexed to the proprietary rights held by the erstwhile zamindars and no such rights could be contemplated in land as divorced from the proprietary rights. The *bhumidhari* rights are thus referable to the proprietary rights of the proprietor as *sir* holder, *khudkasht* holder or the holder of the proprietor's grove.

No doubt there have been variations in these rights as mentioned in sections 152, 154, 155, 156 and 171 but such variations could always be made by the U. P. Legislature. The restriction contained in section 154 was based on the altered policy of the Legislature in avoiding the concentration of wealth in a few persons. The restriction in section 155 appears to have been made in the interest of *bhumidhars* to avoid litigation which is more or less inevitable in the case of a possessory mortgage. Where a possessory mortgage has been executed, section 164 provides that it shall be deemed at all times and for all purposes to be a sale to the transferee. The restriction in section 156 also appears to have been made so that the *bhumidhar* shall have only so much of land as he himself is able to cultivate except where he is a disabled person. The exchange in section 161 has been made subject to the permission of the Assistant Collector previously obtained. The succession to small *bhumidhari* rights, for obvious reasons, has to be different from

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the succession to the large *taluqdari* rights. The above restrictions do not in any way militate against the fact that the erstwhile zamindars have been permitted to retain their *sir* and *khunkasht* lands and proprietor's groves. The *bhumidhari* rights thus are part of the property which had been mortgaged under the mortgage deed dated the 13th July, 1914.

This conclusion is further strengthened by the fact that no compensation has been granted to the zamindars for the acquisition of the rights in *sir* and *khudkasht* lands and the proprietor's groves. Chapter III of the Act deals with the subject of assessment of compensation and contains sections 27 to 64. Section 39 enumerates the items which should be included in the gross assets of the intermediary. Clause (b) of sub-section (1) of the section is relevant and it says that in the gross assets is to be included the amount, computed at the rates applicable to ex-proprietary tenants of similar land, for land in the personal cultivation of or held as intermediary's grove, *khudkasht* or *sir*, in which hereditary rights do not accrue. Hereditary rights here refer to the hereditary rights of tenants. In the case of *sir* in possession of tenants it is provided that the amount included in the gross assets will be the rent at hereditary rates in which hereditary rights accrue or the rent payable by the tenant of the land. It will thus be seen that the amount included in the gross assets of the intermediary will be the rent payable by the tenant. If the zamindar loses such land because some tenant has been in possession of it, he is entitled to have the rent payable to him included in the gross assets. If he himself is in possession, the amount is computed at the rates of rent paid by ex-proprietary tenants. This provision, however, of the inclusion of rent at ex-proprietary rates in the gross assets is only nominal and for the sake of form because section 44 which provides for the determination of the net assets

says, in clause (d), that where the intermediary holds any land in his personal cultivation or as *khudkasht* or intermediary's grove or *sir*, other than that in which hereditary rights accrue, the amount computed at expropriatory rates for such portions only of the land as is in his personal cultivation or held as *khunkasht*, grove land or *sir* shall be deducted from the gross assets. He thus gets no compensation for the land which was in his possession as his *sir* or *khudasht* or his grove. This omission to grant any compensation with respect to such land shows that the Legislature has permitted the intermediary to retain the lands mentioned above.

There is not much case-law on the point and our attention has been drawn only to two Allahabad cases and to the observations of the Supreme Court in the case in which the validity of the Zamindari Abolition and Land Reforms Act was challenged before that Court.

In the case of *Mst. Govindi v. The State of Uttar Pradesh* (1) a Bench of this Court had before it a writ petition challenging the validity of the U. P. Zamindari Abolition and Land Reforms Act. The learned Counsel appearing for the petitioner raised some new points before the Division Bench. The Division Bench considered on their merits and rejected all the points. One of the points urged was that the State Legislature had no power to acquire the rights and interests of the intermediaries in part. It was contended that under the Act *sir* and *khudkasht* land of the intermediaries had been allowed to be retained by them and this showed that the entire rights of the intermediaries had not been acquired. It was contended that under Article 31 of the Constitution the Legislature could acquire the entire rights of a person in any property but had no authority to acquire only some of the rights. The Bench overruled this contention by observing that under the Act all the

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proprietary rights of the intermediaries had been acquired and though *sir* and *khudkasht* lands had been allowed to be retained by the intermediaries, they were allowed to do so as *bhumidhars* and that the *bhumidhari* tenure was a new tenure created by the Statute and *bhumidhars* were not proprietors. Great stress has been laid before us on the fact that the learned Judges observed that the entire rights of the intermediaries had been acquired and that *bhumidhari* tenure was a new tenure created by the Statute. Even in this case it was said that the *sir* and *khudkasht* lands had been allowed to be "retained" by the intermediaries. The main observations however are inconsistent with the observations made by the Supreme Court in the case of *Surya Pal Singh v. Government of the State of Uttar Pradesh* (1). The argument which was advanced before the Division Bench of this Court was actually advanced before the Supreme Court also and it was urged that it was not open to the U. P. Legislature to acquire part of the proprietary rights in land and leave the *bhumidhari* rights with the landlord. Mr. Justice MAHAJAN, as he then was, repelled the argument by saying that "It is open to Government to acquire the whole of the right of an owner or a part of that right. Leasehold and other similar rights can always be acquired and if a person owns the totality of rights, it is not necessary to acquire the whole interest of that person if it is not needed for public purposes". The above observation cannot be said to be a clear authority for the proposition that *bhumidhari* rights are part of the zamindari rights but they impliedly support the proposition.

In the case of *Mst. Janatunnisan v. Mustafa Husain Khan* (2) the question for decision was whether the *bhumidhari* rights, to which the judgment-debtor had succeeded as an heir, were the assets of the late zamindar who held the *sir* and *khudkasht* lands in which such

(1) A.I.R. 1952 S.C. 252.

(2) 1956 A.W.R. 788.

rights had accrued. The Division Bench answered the question in the affirmative. It held "the *sir* and *khudkasht* was undoubtedly the property of Jamaluddin Khan which was inherited by the appellants as the heirs of the deceased. By reason of a change in the law the *sir* and *khudkasht* rights were converted into *bhumidhari* rights. The mere fact that the law has made a change in the nature of the rights which the appellants had acquired as heirs of the deceased, does not mean that the property which has come into the hands of the appellants as heirs of the deceased has ceased to be the assets of the deceased. It still remains the assets of the deceased although the characteristics of the property have, to some extent, been altered by law." This is a clear authority in favour of the proposition that the *bhumidhari* rights of the proprietors are only an altered form of the previous *sir* and *khudkasht* rights. It may be noted here that one of the learned Judges viz., AGARWALA, J., was a member of both the Benches which decided the two Allahabad cases mentioned above.

As already stated, *sir* and *khudkasht* rights could not exist independently of the proprietary rights of the erstwhile zamindars and it is those very rights which have been continued with some modifications and are now called *bhumidhari* rights.

The learned Counsel for the appellants then argued that if the proprietary rights of his client in the mortgaged villages had been sold before the Zamindari Abolition and Land Reforms Act came into force, the judgment-debtor would have been granted the rights of an ex-proprietary tenant in the *sir* and *khudkasht* lands and also in the proprietary groves. The argument is that the *sir* and *khudkasht* rights contain within them the rights of the proprietor as also the rights of tenant and it is only the rights of the proprietor which had been mortgaged by Rana Umanath Bakhsh Singh. But this

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argument cannot be accepted for the reason that when the rights of the proprietor and the tenant both exist in the same person, the right of tenancy merges in the proprietary right. In such a case there are no two separate rights held by the proprietor but only the right as proprietor which includes within the right of a tenant. The right of tenancy remains in abeyance as long as there is no division of the two rights. If the rights of the present judgment-debtor in the *sir* and *khudkasht* land had been sold before the Zamindari Abolition and Land Reforms Act had come into force, there would have been a separation of the rights and it is possible that the ex-proprietary rights of the appellant as a tenant may not have been saleable in execution of the decree, as they were not transferable rights. The proprietary rights would not have been saleable for the reason that they were not transferable and not for the reason that they did not form part of the mortgaged property. This position had been made clear in the case of *Shamsher Bahadur Singh v. Lal Batuk Bahadur Singh* (1). In this Division Bench case reliance was placed on the earlier case of *Sham Das v. Batul Bibi* (2). The facts of Sham Das's case were that a zamindar had mortgaged by way of a usufructuary mortgage his zamindari together with his *sir* lands. He then lost his zamindari rights and became an ex-proprietary tenant of the *sir*. It was held that the usufructuary mortgage did not become ineffectual but took effect as a mortgage of the ex-proprietary rights. The decision was based on the principle that if a mortgagor's title is altered, the land held under the new title is still subject to the mortgage. When Sham Das's case was decided, the rights of a usufructuary mortgage were transferable under section 9 of the North-Western Provinces Rent Act (Act XII of 1881). The right to transfer by such tenants

(1) A.I.R. 1953 All. 147.

(2) (1902) I.L.R. 24 All. 538.

was considerably restricted by sub-section (2) of section 20 of the North-Western Provinces Tenancy Act of 1901. According to this sub-section, the right was not transferable in execution of a decree of a Civil or a Revenue Court and the voluntary transfer could only be effected in favour of a co-sharer. It is after the ex-proprietary tenant's right had become non-transferable that it was possible to hold that it could not be sold in execution of the mortgage decree. This would be so, as already stated, not because it was not part of the mortgaged property but because it was a non-transferable right.

The learned Counsel for the appellant cited the case of *Akbar Husain v. Husain Jahan Begam* (1). Therein it was laid down that where *sir* land is gifted to a person subject to the charge of his paying the profits thereof to another as maintenance allowance and the land is subsequently sold, giving rise to ex-proprietary rights in favour of the donee, his liability to pay the maintenance allowance ceases. The charge for maintenance allowance was held not to continue after the *sir* land had been sold and an ex-proprietary right had arisen out of the sale, but this was because of the fact that the ex-proprietary rights in the case were not transferable and, therefore, could not be the subject-matter of the charge. In cases where the ex-proprietary rights themselves are transferable, these rights would continue to be subject to the mortgage, as they are part of the mortgaged rights. The *bhumidhari* rights are transferable for all practical purposes and they having accrued because of the *sir* and *khudkasht* rights of the mortgagor in the mortgaged property, the *bhumidhari* rights, we think, continue to be subject to the mortgage as being part of the mortgaged property.

Assuming for the sake of argument that they are not parts of the mortgaged property but have been obtained in lieu of the *sir* and *khudkasht* rights in that property,

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they would still be subject to the mortgage, as having been substituted for the mortgaged *sir* and *khudkasht* rights. The *bhumidhari* rights having been granted in *sir* and *khudkasht* lands and the intermediary's groves without payment of any additional sum they will partake of the nature of the mortgaged rights under the doctrine of substituted security, which has a very wide application. The authorities on this point are numerous but mention need be made only of some cases.

In the leading case of *Byjnath Lall v. Ramoodeen Chowdry* (1), it was held by the Privy Council that the mortgagee would take the subject-matter of the pledge in the new form which it had assumed. The doctrine of substituted security was applied. Section 73 of the Transfer of Property Act, we think is only an illustration of that doctrine. It is by no means exhaustive.

In the case of *Rai Baijnath Goenka v. Maharaja Sir Ravaneshwar Prasad Singh* (2), their Lordships of the Privy Council held that where a decree gives a right to possession of a share in a joint mahal which has been partitioned, the Court in proceedings for execution of a decree had power, under section 47 of the Code of Civil Procedure, to put the decree-holder in possession of the specific land substituted for the judgment-debtor's share on partition. The case was not that of a mortgage. It was a case where a decree for possession of joint property had been passed. This joint property was subsequently partitioned and the Privy Council held that in execution, proceedings notice could be taken of the partition and the decree-holder put in possession of the property which was allotted to the judgment-debtor as a result of the partition, though it was not property for the possession of which the decree had been passed. The next case is the case of a mortgage.

(1) (1873-74) L.R. 1 I.A. 106.

(2) (1921-22) L.R. 49 I.A. 139.



The Privy Council held in the case of *Mohammad Afzal Khan v. Abdul Rahman* (1) that if the subject-matter of mortgage is undivided share and the co-sharers effect a partition, the mortgage must pursue his remedy against the share allotted in severally to the mortgagor.

The case of *Venkatarama Iyer v. Esuma Rowthen* (2) was a case where a decree for money had been mortgaged and subsequently the decretal amount was realized by the mortgagor himself. It was held that the mortgagee had a charge on the amount so realized. The principle applied was that the mortgagee was entitled to a charge on the property which through no fault of his had taken the place of the mortgaged property.

Similarly in the Full Bench case of *Girdhar Lal v. Alay Hasan Musanna* (3) it was held that where a portion of the mortgaged land was acquired by Government under the Land Acquisition Act and compensation was awarded to the mortgagor, the principle of substituted security applied to the compensation money and the mortgagee was entitled to recover the same from the mortgagor. As far as compensation is concerned, it would be specifically covered by sub-section (2) of section 73 of the Transfer of Property Act but the principle of substituted security extends even further and applies to every property which has been obtained in lieu of the mortgaged property. In the course of the judgment the learned Judges referred to a number of cases in which it was held, even before the amendment of section 73, that where the property covered by the mortgage is compulsorily acquired the lien which attached to the property is transferred to the compensation money which becomes a security in a new form. They then observed:

"All these decisions give effect to the well recognized doctrine of substituted security by virtue of

(1) (1931-32) L.R. 59 I.A. 405. (2) (1910) I.L.R. 33 Mad. 429.  
(3) A.I.R. 1938 All. 221.

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which the rights and interest of the mortgagee in the mortgaged property attach to the property which may replace the mortgaged property."

To the same effect is the decision of a Full Bench of Madhya Bharat High Court in the case of *Nabbobai v. Hasan Gani Abdul Gani* (1).

We consequently hold that the *bhumidhari* rights in the *sir* and *khudkasht* lands and the proprietor's groves are subject to sale in execution of the mortgage decree also as substituted security, assuming for the sake of argument that these rights did not form part of the mortgaged property.

The learned Counsel for the respondent further urged that assuming that the *bhumidhari* rights cannot be treated as part of the mortgaged property or as substituted security, they are liable to be sold as they had been carved out of the mortgaged property and amalgamated with it. The argument is that the judgment-debtor was entitled to compensation for his *sir* and *khudkasht* lands but the Legislature did not provide for the payment of this compensation and permitted him to continue to occupy his previous *sir* and *khudkasht* lands and his groves. It is said that the *bhumidhari* rights would in such a case be accession to the substituted security of the compensation money and would thus partake of the nature of the mortgaged property. In support of this contention reference was made to the case of *Punmayya v. Chilakalapudi Venkatappa Rao* (2). In this case a learned Judge of the Madras High Court held that where the vendee of a mortgaged house demolished it and rebuilt another house using the material of the mortgaged house, the new house became subject to the mortgage. We do not propose to consider this third submission of the learned Counsel, as we are in his favour on the first two submissions.

(1) A.I.R. 1954 M.B. 181.

(2) A.I.R. 1926 Mad. 343.

We now come to the second point urged by the learned Counsel for the appellant. The contention of the learned Counsel is that the application, dated the 20th September, 1952, is a fresh application for execution of the mortgage decree and as such it is barred by the 12 years rule of limitation contained in section 48 of the Code of Civil Procedure. He concedes that it has been finally held between the parties that the fourth execution application filed on the 25th May, 1940, was not barred by time. The contention the learned Counsel for the respondent is that the present execution proceedings are continuing under the execution application filed on the 25th May, 1940, and the application, dated the 20th September, 1952, was not a fresh application for execution but was only an application ancillary to the application of 1940. Here again we think that the contention of the learned Counsel for the respondent is correct.

We have already given above the purport of the application, dated the 20th September, 1952. It is not in the form of execution applications as provided in Order XXI, rule 11 of the Civil Procedure Code and it has not been addressed to the executing Court. On the other hand, it was filed before the Revenue Court which was proceeding to execute the decree under the execution application filed in 1940. The application clearly appears to have been made because of the coming into force of the Zamindari Abolition and Land Reforms Act, as stated in paragraph 3 of the application. The result of this Act was that the proprietary rights of the appellant in the mortgaged villages could not be sold, as the major portion of those rights had ceased to exist except in some of the properties. The decree-holder in his application pointed out that buildings, trees and private wells continued to belong to the appellant and these could be sold in execution of the decree, as also

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his groves and *bhumidhari* rights which were transferable. The Bank also claimed that the compensation money awarded to the appellant as a result of the abolition of the Zamindari rights had become subject to the mortgage and, therefore, was payable to the decree-holder. The Bank did not seek in this application to execute the decree against any new property but only against the property which had still remained with the judgment-debtor and was part of the mortgaged property or became subject to the mortgage by the rule of substituted security. The application was necessitated by the change in the circumstances brought about by the coming into force of the Zamindari Abolition and Land Reforms Act. The execution of the decree had to be limited to the properties which still remained with the judgment-debtor or were to be received by him in lieu of the mortgaged property. The entire villages could no longer be sold as prayed for in the execution application of 1940 and execution could be directed only against part of the property. Hence the decree-holder had to specify that part. We think that the application made by him on the 20th September, 1952, was not a fresh application for execution but an application to continue execution proceedings already pending under the execution application of 1940, with modifications which had been necessitated by the coming into force of the Zamindari Abolition and Land Reforms Act. If the application of the 20th September, 1952, was not a fresh application for execution and we think it was not a fresh application the learned Counsel for the appellant concedes that no question will arise of the execution being barred by time. He, however, cited the case of *Bandhu Singh v. K. T. Bank Ltd., Gorakhpur* (1) as an authority for the proposition that the application of the 20th September, 1952, was a fresh application for execution. We do not think that the above case supports the con-

(1) A.I.R. 1931 All. 134.

tention of the learned Counsel. In this case, after the expiry of 12 years, the decree-holder filed an application for the attachment and sale of shares in two new villages which had never been mentioned in any of the previous applications for execution and the learned Judges held that the decree-holder was now seeking to attach fresh property and his application for attachment of this new property was a fresh application, within the meaning of section 48 of the Code of Civil Procedure and was thus barred by time. In the case before us the decree-holder is not seeking to execute the decree against any new property but is only seeking to execute the decree against part of the property for the sale of which he had already applied within the time allowed by law.

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The next case of *Nawab Newazish Ali Khan v. Raja Bhanu Pratap Singh* (1) is also clearly distinguishable. The facts of this case briefly are that a simple money decree had been passed on the 14th August, 1933. Both the judgment-debtor and the decree-holder died thereafter and on the 10th August, 1945, an application was made for substitution of names and for transmission of the decree to another Court. The manner in which the decree was to be executed was not given in the application, nor did that application contain any list of properties which were to be sold in execution of the decree. On the 30th August, 1947, an application for execution of the decree was filed, for the first time attaching a list of properties against which execution was sought. It was held that the application, dated the 30th August, 1947, must be held as a fresh application and not a mere continuation of the previous application, dated the 10th August, 1945. It would thus appear that the application for execution was made more than 12 years after the date of the decree and the previous application made within 12 years was only an application for substitution of names and transmission of the decree to another Court.

(1) 1952 A.L.J. 601.

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We have already given our reasons for holding that the application, dated the 20th September, 1952, was not an application for execution at all but was an application ancillary to the execution application filed on the 25th May, 1940. It is well established that no rule of limitation is applicable to such ancillary applications. They are to be treated as applications in an already pending execution case.

In the case of *Shaikh Kamar-ud-din Ahmad v. Jawahar Lal* (1) their Lordships of the Privy Council laid down that an application which in substance as well as in form was an application to revive and carry through a pending execution of decree which had been suspended by no act or default of the decree-holder, was not an application to initiate a fresh execution and was not barred by Article 179 of the Indian Limitation Act. They further held that the execution proceedings commenced under the previous execution application had not been finally disposed off when the application under consideration was made.

Their Lordships have further clarified the position in the case of the *Oudh Commercial Bank Ltd. v. Thakurain Bind Basni Kuer* (2). They have held that the question whether an application for execution of a decree is a fresh application within section 48 of the Code of Civil Procedure must be decided on the facts and circumstances of each case and on the substance of the matter. The mere fact that the executing Court by inadvertence terminated the execution case will not make a further application for execution a fresh application. Even if a higher rate of interest is subsequently claimed under an agreement it will not make the application a fresh application for execution.

(1) (1904-05) L.R. 32 I.A. 102.

(2) (1938-39) L.R. 66 I.A. 84.

In *Chunder Coomar Roy v. Bhogobutty Prosonno Roy* (1), a Full Bench of the Calcutta High Court held that the words "applying to enforce the decree" in Act IX of 1871 mean the application by which proceedings in execution are commenced and not applications of an incidental kind made during the pendency of such proceedings. We think the application of the 20th September, 1952, was an application of an incidental kind made during the pendency of execution proceedings.

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Similarly a Full Bench of this Court in the case of *Rahim Ali Khan v. Phul Chand* (2) held that the applications by the decree-holder to the executing Court to go on from the point where the execution proceedings had been arrested and to complete execution of the decree would be applications merely ancillary to the substantive application for execution.

To the same effect is another decision of a Full Bench of this Court reported in the case of *Ram Sarup v. Dasrath Tiwari* (3).

A Division Bench of this Court in the case of *Girdhari Lal v. Ram Charan Lal* (4) followed, as it was bound to do, the above Full Bench decisions.

A Bench of the Madras High Court in *Divakaran Nambudiripad v. Koodalur Manakkal Brahmadathan Nambudiripad* (5) held that an amendment of execution application can be allowed even after the lapse of 12 years from the date of the decree.

We think that on the principle laid down in the above cases it must be held that the application, dated the 20th September, 1952, was not a fresh application but an incidental or ancillary application made in connection with the pending execution case started with the execu-

(1) (1878) I.L.R. 3 Cal. 235.

(2) (1896) I.L.R. 18 All. 482.

(3) (1917) I.L.R. 33 All. 517.

(4) A.I.R. 1926 All. 331.

(5) A.I.R. 1945 Mad. 241.

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tion application, dated the 25th May, 1940, it thus cannot be held to be barred by the provisions of section 48 of the Code of Civil Procedure. This point also must be decided against the appellant.

These were the only two points which were urged before us and we have decided both of them against the appellant.

The appeal, therefore, must fail. It is accordingly dismissed with costs. The stay order is discharged.

*Appeal dismissed.*

### (FULL BENCH) CRIMINAL REFERENCE

*Before Mr. Justice Chaturvedi, Mr. Justice Mulla  
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**Dispossession**—*Breach of peace—Preliminary order under s. 145 (1), Criminal Procedure Code passed more than two months after dispossession—Order, validity of—Criminal Procedure Code, 1898, s. 145(1) (4), scope of.*

Where a dispossessed person seeks relief under the provisions of s. 145, Criminal Procedure Code and the Magistrate passes his preliminary order under s. 145(1), Criminal Procedure Code more than two months after such dispossession but by his final order he puts him in possession, this order cannot be deemed to be a valid order on the ground that the Court itself was responsible for this delay and so a party cannot be penalised for the fault committed by the Court.

Case-law discussed.

Criminal Reference No. 43 of 1956 made by Mohd. Nurul Ain, Additional Sessions Judge of Rae Bareilly, dated 23rd June, 1956.

[This case was originally heard by MULLA, J. who considering that there were conflicting principles,

*\*Sitting at Lucknow.*



referred it to a Division Bench. The case was then placed before the Bench consisting of MULLA and NIGAM, JJ., who considering the case to be of immense importance referred the case to a Full Bench.]

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The facts appear from the following referring order—

MULLA, J.:—This is a reference made by the learned Additional Sessions Judge, Rae Bareilly, recommending that the order of the learned Magistrate giving possession of the disputed property to Sukhdin, the first party, be set aside and that this property should be given to Ganga Bux Singh, the opposite-party.

Sukhdin filed an application against Ganga Bux Singh under section 145 Criminal Procedure Code on the 8th of August, 1955. In this application he alleged that plot no. 369/2 belonged to his brother Bhagwan and after his death Sukhdin came in possession of that plot. It was mentioned in this application that on the 24th of July, 1955, about 15 days before he filed his petition, Ganga Bux Singh the opposite-party, who was originally the zamindar took possession over this plot forcibly. It is not quite clear from the record as to why proceedings were not started immediately by the Magistrate before whom the application was presented and we find that he passed the preliminary order as late as the 14th of October 1955. This by itself proves that the preliminary order was passed three months after the alleged date of dispossession.

The proviso to sub-section (4) of section 145, Criminal Procedure Code runs as follows—

“Provided that if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.”

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It is apparent from this proviso that the period of two months is to be computed from the date of the preliminary order, for the words "date of such order" clearly point that way. This proviso is a sort of legal fiction which deems to a person to be in possession, even though he has been dispossessed up to 60 days before the date of the preliminary order. I have mentioned above that the preliminary order in this case was passed about 90 days after the alleged date of dispossession. It is, therefore, clear that on an interpretation of this proviso the dispossession took place at a time which was beyond the range mentioned in the proviso and, therefore, according to the words of this proviso the applicant could not be deemed to be in possession, if he was dispossessed three months before. In order to override this difficulty Sukhdin when he produced his evidence in court took up the stand that after filing this petition, he had taken repossession over the disputed property. The learned Additional Sessions Judge was quite justified in coming to the conclusion that this was a fictitious plea taken by the applicant in order to bring his petition within the purview of this proviso. According to the Additional Sessions Judge the Magistrate was not entitled to pass an order in favour of Sukhdin because admittedly he was dispossessed three months before the date of the preliminary order and, therefore, the criminal courts could not give him any relief. It was on reaching this conclusion that he made the reference in this case.

It was argued before me by the counsel for Sukhdin, the petitioner in the Magistrate's court, that he cannot be penalized because of the laches of the Magistrate in not passing a preliminary order almost immediately after he presented his petition. He admitted that Sukhdin was dispossessed about three months before the preliminary order, but as he had filed the petition within 15 days of his dispossession, the preli-

minary order should have been passed within the time-limit given in the proviso. The failure of the Magistrate to take prompt action has prejudiced his case and he cannot be made to suffer for the fault committed by the Magistrate. In support of his contention he has placed two decisions before me. The first decision is in the case of *Syed Mohammac Nasir v. Dwarka Singh* (1). In this decision a learned Judge of the Oudh Chief Court observed that the procedure prescribed in the proviso quoted above is not mandatory and if the Magistrate so elects he can act under sub-section (4) and decide which of the parties was in possession without taking into consideration the fact as to which of the parties has been dispossessed within two months of the date of the preliminary order. If this decision alone had been in favour of the petitioner, I would not have made this order of reference to a Bench of this Court for a decision of this case. There are a large number of cases in which it has been held that the words of the proviso are mandatory and a Magistrate is not entitled to decide the question of possession, if the dispossession had taken place more than 60 days before the date of the preliminary order. There is, however, another decision of the Madras High Court in *Chunchu Narayana v. Karrapati Kesappa* (2). It is a Bench decision. The relevant and applicable law has been carefully considered in this decision. The Judges came to the conclusion that the doctrine of *nunc pro tunc* applies to such a case and no person can be prejudiced by the action of a court. It was held by them that the Magistrate should not permit any appreciable time to elapse between the presentation of the application and the issuing of the preliminary order, but if he passes the preliminary order after a lapse of time, it should be deemed to have been made when the Magistrate took cognizance of the petition. As I am referring this case

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(1) A.I.R. 1939 Oudh 31.

(2) I.L.R. [1951] Mad. 951.

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to a Bench, it is not necessary for me to disclose at this stage whether I am in agreement with this view or not.

It, therefore, seems to me that there are two conflicting principles which have to be decided in coming to a conclusion on this point. On one side there is the doctrine mentioned above and on the other side the principle that the criminal courts can give relief under the provisions of section 145, Criminal Procedure Code only in those cases where an urgent relief is necessary as there is an apprehension of a breach of the peace. If the first principle is accepted. It is obvious that the order of referral under section 145, Code of Criminal Procedure made by the trial court is not correct. If on the other hand, the other principle prevails, which is supported by a long string of decisions, the reference made is correct.

I, therefore, refer this case to a Division Bench of this Court.

[The Division Bench referred the case to a Full Bench by the following order.]

The point of law referred to a Division Bench in this case is of immense importance as it will affect a large number of cases. There are single Judge as well as Division Bench decisions which support the two rival views. We, therefore, do not want to express any opinion on the point referred to us, as in our opinion the case should go before a bigger Bench.

We, therefore, direct that this case should be placed before the Hon'ble the Chief Justice so that he may constitute a Full Bench to decide this case.

Criminal Reference No. 31 of 1957 shall remain connected with this reference.

*B. L. Kaul and Narain Sahai* for the applicant.

*B. L. Shukla* for the opposite-parties.

NIGAM, J.:—On 8th August 1955 Sukh Din made an application under section 145, Code of Criminal Procedure to the Sub-Divisional Magistrate, Salon, district-Rae Bareli claiming to be *sirdar* of plot no. 369/2 in village Ahal, police station Salon as heir of his deceased brother, Bhagwan Din. He alleged that Ganga Baksh Singh, the opposite-party, who was previously the zamindar, had taken forcible possession of the plot on or about the 24th July, 1955.

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The Sub-Divisional Magistrate asked the police for a report by 23rd August 1955 as to the existence of an apprehension of a breach of the peace. The police report was not received on that date and was awaited for till 12th September, 1955. Actually the police submitted a report on 31st August, 1955 and this was received by the Magistrate on 8th September, 1955 but for some unexplained reason it was not put up before the learned Magistrate on 12th September, 1955 and no preliminary order under section 145(1) of the Code of Criminal Procedure was passed till 14th October, 1955. The land in question was attached on 18th November, 1955.

After completing his enquiry the learned Magistrate by his order dated 24th April, 1956 held that Sukh Din was in possession all along. He released the attached crop in favour of Sukh Din and forbade Ganga Baksh Singh from interfering with Sukh Din's possession. Thereupon Ganga Baksh Singh filed a revision before the Sessions Judge. This was heard by the learned Additional Sessions Judge who held that Sukh Din had been, on his own admission, out of possession for more than two months on the date of the Magistrate's preliminary order and as such he could not under the proviso to sub-section 4 of section 145, Code of Criminal Procedure be deemed to have been in possession on the date of that order. The learned Additional Sessions

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Judge has accordingly referred the matter to this Court and recommended that the order passed by the learned Magistrate on 24th April, 1956 be set aside and Ganga Baksh Singh be declared to be in possession and be restored to possession.

The reference came up for hearing before one of us. It was urged that Sukh Din could not be penalised for the laches of the learned Magistrate inasmuch as he had unnecessarily delayed the passing of the preliminary order. It was pointed out that if the learned Magistrate had passed the preliminary order on 12th September, 1955 on which date the police report had been received, the dispossession would have been within two months of this preliminary order and Sukh Din would have been restored to possession. The argument was that Sukh Din could not be made to suffer for the unnecessary delay on the part of the learned Magistrate. It was urged that the decision in *Chunchu Narayana v. Karrapati Kesappa* (1) lays down the correct law when it approves of the application of the principle of *actus curiae neminem gravabit* (an act of the Court shall prejudice no man) and therefore the Magistrate's preliminary order under section 145(1) of the Code of Criminal Procedure should be deemed to have been passed on the date the application was made to him, i.e. on the date he took cognizance of the application of Sukh Din. This view was contrary to the view expressed in the previous decisions of this Court and therefore the learned single Judge referred the matter to a Division Bench which in its turn, in view of the importance of the question and the clear cleavage of opinion between different High Courts, considered it proper to refer the matter to a larger Bench.

We have heard the learned counsel for the parties at considerable length. The arguments addressed before

(1) I.L.R. [1951] Mad. 951.

us reflect the conflict of authorities. There is the opinion as represented by *King-Emperor v. Baijnath* (1), *Meharban Singh v. Bhola Singh* (2), *Pearey Lal v. The State through Khalsa* (3), *Tolan Kalita v. Bhuvan Chandra* (4), *Padmaraju Subha Raju v. Padmaraju Koneti Raju* (5), *Ayyan Padmanabhan v. Padmanabhan Nanu* (6) and *Lakshmi Narain Singh v. Jugeshwar Jha* (7). A different view has been taken in *Chunchu Narayana v. Karrapati Kesappa* (8). This has been substantially accepted in *Badramma v. Kotam Raj* (9). The High Court of Orissa has taken a different view partially in consonance with the Madras view in *Ganga Dhar Singh v. Shyam Sunder Singh* (10). The learned Judges of the Orissa High Court appear to have laid down:

"If there was delay due to local enquiry or otherwise in drawing up the proceeding, a party will not be permitted to take the date of his petition or the date of his reporting the matter to the police to be the starting point for computation of the period of two months for the purpose of applying the second proviso to section 145(4). . . . There may be circumstances where the delay in taking action is entirely due to the court. For instance . . . the Magistrate, instead of drawing up a proceeding under section 145, Criminal Procedure Code draws up a proceeding under section 144, Criminal Procedure Code . . . and then, on the expiry of the order under section 144 converts the proceedings into one under section 145, it will not be proper to hold that the relevant date for the purpose of the proviso to sub-section (4) of section 145 is the date on which the preliminary order under section 145(1) was passed and not the date on which the order under section 144 was passed."

(1) (1930) I.L.R. 5 Luck. 440.

(3) 1956 A.L.J. 267.

(5) A.I.R. 1955 Andh. 99.

(7) A.I.R. 1954 Pat. 169.

(9) A.I.R. 1955 Hyd. 140.

(2) (1935) I.L.R. 57 All. 488.

(4) A.I.R. 1951 Ass. 161.

(6) A.I.R. 1955 T. C. 262.

(8) I.L.R. [1951] Mad. 951.

(10) A.I.R. 1958 Orissa 153.

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The arguments that appealed to and were accepted by the Madras High Court have been repeated before us. In view of the clear conflict, we are of opinion that we should proceed to consider the provisions of the section itself and their scope keeping the judicial decisions in view and examine the arguments afresh.

Section 145 of the Code of Criminal Procedure so far as it is relevant for our purpose reads:

"(1) Whenever a . . . Magistrate of first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists . . . he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned . . . to put in written statements of their respective claims . . .

(2) . . . .

(3) . . . .

(4) The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements . . . , and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided . . .

(5) Nothing in this section shall preclude any party . . . from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed . . .



(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order . . . and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

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(7) . . . .

(8) . . . .

(9) . . . .

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107."

The ratio decidendi in *Chunchu Narayana v. Karra-pati Kesappa* (1) was that no one should be made to suffer for the Court's failure to do a thing which it ought to have done. Two of the judgments of the same High Court were relied upon and two others were dis-sented from. The argument before the Court was:

"In other words, the contention is that when once a preliminary order contemplated under section 145 (1) is passed it should be deemed to have been passed *eo instanti* the receipt of the complaint or the police report and therefore the period to be reckoned backwards of the dispossession must be the period of two months from the date of the complaint."

After referring to the law as it previously stood and the two decisions of the Calcutta High Court, the learned judges stated:

"It was when the state of the case law was such, that the proviso was introduced and the object of the proviso was to create, as it were, by a legal fiction, a possession with the party who is entitled to be in possession as found by the Court, though

(1) I.L.R. [1951] Mad. 951.

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actually at the time of the presentation of the petition he was not in possession. This shows that the proviso itself is the result of a legal fiction because physically the successful party was not in possession on the date of the presentation of the petition or the preliminary order; but by the proviso the Court deems that he is in such possession. We have already expressed our opinion that the Legislature did not intend that any time should lapse between the presentation of the petition and the passing of the preliminary order if the Magistrate is satisfied. One should follow immediately the other. The satisfaction of the Magistrate before passing the preliminary order can be based either on the police report or other information. At that time he has no jurisdiction to enquire into the matter and find out about the truth or otherwise of the police report or the other information. So the Magistrate is not justified in delaying the passing of a preliminary order if the police report or other information is sufficient to satisfy him that a dispute likely to cause a breach of peace existed. If the Magistrate is not justified in taking time to pass a preliminary order, then even if the time mentioned in the order is of a subsequent date, it should be deemed to have been passed immediately after the receipt of the police report or the other information."

They continued at page 967 :

"If that is the proper view to take of the compelling provisions of sub-section (1) of section 145, viz., that no appreciable time should elapse between the presentation of the complaint or the receipt of the police report and the passing of the preliminary order, then it necessarily follows that the preliminary order should be deemed to have been made

when the Magistrate takes cognizance of the matter and satisfies himself about the urgency. Therefore, by applying the legal fiction of *nunc pro tunc* it is just that the preliminary order should be deemed to have been made on an earlier date."

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As the argument was that the preliminary order passed by the Magistrate must be 'deemed to have been passed' on the date of petition or the police report was received, it is not at all necessary for us, at this stage, to refer to the contentions that the language of the provisions is clear and unambiguous, that in the circumstances there is no scope for interpretation and that the Courts have no power to legislate but must apply the law as it stands. It is also not necessary to refer to the arguments that the law as regards the limitation must be strictly applied or that despite the attention of the Legislature having been invited to the supposed defect no change has been made though the Code of Criminal Procedure and section 145 itself have been recently amended.

A similar view was taken in *Bhacramma v. Kotam Raj* (1). The principle invoked was slightly different. The learned Judges endorsed the view that:

"When the words of the statute are clear, there is no room left for interpretation and the clear words of the statute should be given effect to. Still, when a given state of affairs does not come within the obvious meaning of the words of the statute, i.e., when certain contingencies are not provided for; or, when the words of a provision though crystal clear, do not embrace a particular question in hand, and it seems obvious that it was not contemplated by the Legislature, there appears to be, what is well known in canons of interpretation, the case of *casus omissus*."

(1) A.I.R. 1935 Hyd. 140.

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We have carefully considered these views and with all respect find ourselves unable to agree with them. A careful look at the provisions and purpose of the section will, in our opinion, indicate that there is no scope for the application of either of the two maxims relied upon in the two rulings.

Section 145(1) does not specifically mention any petition. The Magistrate has to be satisfied from a 'police report' or 'other information'. That 'information' may be an application by an interested party or a third party or even the Magistrate's personal information. The information may have been communicated to him in writing or orally or he may have even noticed some conduct of a party which might have given him an indication of an apprehension of a breach of the peace. It would thus appear that no application is, strictly speaking, necessary for the initiation of the proceedings. It is not that a party comes to the Magistrate with a cause. The starting point of an application or even a police report may not be available in every case and thus when the Magistrate, himself suspecting an apprehension of a breach of the peace, makes certain enquiry and is then satisfied of the existence of the apprehension of a breach of the peace and makes an order in writing stating the grounds of his being satisfied, the date of his order cannot be referred back to the first information received by him. From this it is clear that the starting point of the proceedings is not the information received by the Magistrate or the application made to him or even the police report but his satisfaction recorded in writing. SUBHA RAO, C.J., in *Padmaraju Subha Raju v. Padmaraju Koneti Raju* (1) emphasised the same point and stated:

"Though it often happens that a Magistrate is moved by an application by the affected party, a

(1) A.I.R. 1955 Andh. 99.

preliminary enquiry also need not be at the instance of a particular party. The Magistrate may initiate it *suo motu*. Even if he initiates it at the instance of an affected party, he may drop it if he is not satisfied that the necessary conditions exist."

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The proceedings start not on the complaint or the police report but on the subjective satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists. The crucial date in all the sub-sections is the date of the Magistrate's recording his satisfaction. That is the date on which the possession of parties has to be enquired into and that is also the date from which the period of two months mentioned in the first proviso to sub-section (4) of section 145, Criminal Procedure Code has to be counted. Thus it is clear that the Legislature clearly intended that this date should be treated as the date of the initiation of the proceedings and not the date of the original first information given to the Magistrate. In the circumstances it is difficult to apply the argument of *casus omissus* which was accepted by the High Court of Hyderabad.

From the nature of the provisions it is clear that the Magistrate has been given this power primarily to preserve peace. The individual rights are affected only incidentally. The nature of the enquiry is *quasi-civil*. It is an incursion by the criminal court in the jurisdiction of the civil court. It is, therefore, necessary that this incursion should be carefully circumscribed to the extent absolutely necessary for discharging the function laid on the Magistrate of preserving the peace. The provisions of section 145, Code of Criminal Procedure make that amply clear. The Magistrate does not enquire into the merits of the claims of the parties or even their right to possess the subject of the dispute. He is only concerned with the question as to who was in actual physical possession on the relevant date. This also indi-

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cates that the starting point of the proceedings must be the date when he was satisfied that an apprehension of a breach of the peace existed and not when he received the first information.

It is also clear that the parties have no right to get their dispute adjudicated upon by the Magistrate. Even on the receipt of the application the Magistrate may not think any action necessary. He may not take any action at all under section 145, Code of Criminal Procedure. Instead he may take action either under section 107, Code of Criminal Procedure or under section 144 of the same Code. He is not even bound to come to a decision. He may find that he is unable to satisfy himself as to which of the parties was then in such possession [Section 146(1) of the Code of Criminal Procedure]. In that case he may attach the property until a competent court has determined the rights of the parties thereto and decided which of the parties was entitled to possession. We need not emphasise that the provisions of the section clearly indicate that the parties, though they may inform the Magistrate, are not entitled under the law to a decision of the dispute. It is within the discretion of the Magistrate to take action or not and he may come to a decision or may express his inability to decide the matter. Thus the proceedings under section 145, Code of Criminal Procedure are materially different from the proceedings in a proper suit. It is thus not possible to apply the maxims that are applicable to a civil suit to proceedings under section 145, Code of Criminal Procedure. This is further emphasised by the fact that the Magistrate's jurisdiction does not extend to a determination of the right of the parties. He does not decide as to which of the parties was entitled to remain in possession or even the nature of the possession. He merely enquires into the actual physical possession and not the nature thereof. The enquiry itself is

summary. This fact has been further underlined by the recent amendments. The result of the enquiry may itself be not improperly equated to a temporary injunction granted by a civil court. The enquiry under section 145, Code of Criminal Procedure is not a trial. No particular procedure is provided and the parties have all the time a right to go to the Civil Court against the decision of the Magistrate.

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The first proviso to sub-section (4) of section 145 is clearly permissive. The Magistrate may treat the party dispossessed within two months of his order under section 145(1) as being in possession. It is his discretion, no doubt a judicial discretion to be exercised on the facts of the case, either to treat the party dispossessed within two months of his preliminary order as being in possession or to refuse to do so. He may, if he is of opinion that it is the rightful owner who has dispossessed a trespasser within two months of his order, very properly refuse to take notice of the dispossession. The parties have no right to ask the Magistrate to treat the party dispossessed as being in possession. The proviso itself does not vest any right in the party interested. This being a discretionary provision it is only just and proper that the discretion should be circumscribed, within narrow limits and once circumscribed, the limits have to be strictly observed. The Legislature in its wisdom vested only a limited discretion and we can see no reason for further extending the period for the exercise of this discretion by deeming that the preliminary order was passed on the date of the original application. SUBHA RAO, C.J., in *Padmaraju Subha Raju v. Padmaraju Koneti Raju* (1) at page 102 of the report observed:

“The foundation for the application of the principle is that the Court is under a duty to do a particular act and it has failed to do so which caused

(1) A.I.R. 1955 Andh. 99.

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prejudice to the other side. To apply that provision to the instant case, it must be established that the court should make the preliminary order on the date of the petition filed under section 145, Criminal Procedure Code."

In the next paragraph he observed:

"The said principle was invoked and applied to a case where a party has done all he should do under a statute and, by a mistake of Court, he was precluded from completing the act, in which case it was held that the party must be deemed to have done the act on the date on which he had done his part."

We respectfully agree with those observations. We have already pointed out that the Court was not bound to take action on the application and that as the petitioner was not entitled to any orders the Court's failure to pass an order under section 145(1) of the Code of Criminal Procedure did not in fact occasion any prejudice. The petitioner was not entitled to any order. In these circumstances we respectfully agree with the view expressed in the Andhra case (1) and with great respect cannot agree with the views expressed by the learned Judges in the Madras decision (2). The proceedings being only in the interest of the maintenance of peace and not in the interest of the preservation of the rights of any party, the application of equitable principles referred to does not appear to us to be justified.

We have recorded our respectful disagreement with the decisions of the Madras and the Hyderabad High Courts. It remains for us only to refer briefly to the other arguments addressed to us. It has been urged upon us that the language of the section is clear and there being no ambiguity, the Courts have no right to put their own interpretation on the language as they have no right to legislate. The mere fact that some

(1) A.I.R. 1955 Andh. 99.

(2) I.L.R. [1951] Mad. 951.



hardship may result in individual cases is no justification for our putting the interpretation which will do violence to the language of the section. There are also good reasons for the Legislature not having fixed a longer period. It may very well be that when one party, howsoever wrongfully, has been in peaceful possession for a period of two months, there is no real apprehension of a breach of the peace left and no justification for holding that there is a likelihood of a breach of the peace. In the circumstances, the dispute may very well be left for determination to the Civil Court. It is not necessary for us to point out that the jurisdiction of the Magistrate starts with his satisfaction that an apprehension of a breach of the peace exists and ceases the minute he is satisfied that no such apprehension exists or existed. The provisions of sub-section (5) are clear. All the parties are permitted to show that no dispute likely to cause a breach of the peace "exists or has existed". The sub-section clearly directs that in such case the Magistrate shall cancel his order and all further proceedings shall be stayed. This may very well be before a decision has been given the apprehension of a breach of the peace has ceased to exist but the dispute itself continues. We also need not point out that the proviso which creates a legal function itself, provides a limitation which must be strictly observed. In *Nagendra Nath Dey v. Suresh Chandra Dey* (1), it was laid down:

"The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think the only safe guide."

The Legislature has carefully provided a period of limitation and we see absolutely no reason why the provisions be not strictly enforced.

(1) A.I.R. 1932 F. C. 165

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On a consideration of the arguments before us we respectfully disagree with the views of the Madras and Hyderabad High Court and in agreement with the weight of the authority and the decisions of the Division Benches of the Assam, Andhra and Travancore-Cochin High Courts and the previous decisions of this Court, we hold that the provision means what it clearly says and it must be strictly construed. We hold that the Magistrate was not justified in treating or empowered to treat the party who had been dispossessed more than two months before the actual date of his preliminary order under section 145(1), Code of Criminal Procedure as being in possession on the date of his order under proviso (1) to sub-section (4) of section 145 of the Code of Criminal Procedure.

The result is that we accept this reference and the recommendation of the learned Additional Sessions Judge.

MULLA, J: I have had the advantage of reading the decision of my brother Nigam and I agree with the conclusion reached by him. I will, therefore, briefly give the reasons which have made me come to the same conclusion. The facts of the case are mentioned in the decision of my brother and I need not repeat them here. I will come straight to the point which is to be decided in this case.

The question which was referred to the Full Bench was that where a dispossessed person seeks relief under the provisions of section 145, Criminal Procedure Code and the Magistrate passes a preliminary order under section 145(4), Criminal Procedure Code more than two months after such dispossession but by his final order he puts him in possession, can this order be deemed to be a valid order on the ground that the court itself was responsible for this delay and so a

party cannot be penalized for the fault committed by the Court? This question has been answered in the affirmative as well as in the negative by different Judges in different decisions and there is a clear conflict of opinion. These decisions are cited in the judgment of my brother Nigam. In my opinion this question can be answered only if several subsidiary questions are answered first. They may be tabulated as follows:

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Q. 1. Looking to the scope and purposes of section 145, Criminal Procedure Code is there any reason to hold that the language of section 145(4), Criminal Procedure Code does not fully express the intention of the Legislature?

Q. 2. Is there any ambiguity in the language of section 145(4), Criminal Procedure Code which would authorize a court to give a different meaning to the words other than their natural meaning by introducing the principles of equity?

Q. 3. Can equitable principles be applied to an order passed under section 145(6), Criminal Procedure Code?

Q. 4. Does the law contemplate that the Magistrate should pass a preliminary order without reaching a subjective satisfaction that there is a likelihood of a breach of the public peace?

and

Q. 5. Can the Magistrate be deemed to have reached a subjective satisfaction at a time when actually he had not reached it and when he was still gathering his information whether there was a likelihood of a breach of the public peace or not?

As in my opinion all these questions should be answered in the negative, I agree with the conclusions reached by my brother Nigam and hold that a

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dispossessed party cannot be put back in possession if the preliminary order was passed more than two months after his dispossession.

I will now take up these questions one by one.

*Q. 1. Looking to the scope and purpose of section 145, Criminal Procedure Code is there any reason to hold that the language of section 145(4), Criminal Procedure Code does not fully express the intention of the Legislature?*

I will first deal with the object of the Legislature in enacting section 145, Criminal Procedure Code. In *Ganga Singh v. Raj Bahadur Singh* (1) which was decided by a Divisional Bench of this Court. I had made some observations on this point which express my point of view. I will quote an extract from that decision here:

"In my opinion in interpreting the provisions of a statute it is always desirable that the purpose of the enactment should be kept in view. Section 145, Criminal Procedure Code is really an incursion of the criminal courts in spheres of those disputes which should be appropriately decided by the civil courts. The only justification for this intrusion is that the interests of order and peace are paramount and all other interest including the interests of the owners of immovable property are subservient to it. The State cannot permit that riots should be committed and heads should be broken merely, because two contending parties hold different opinions about their claims to the possession and ownership of some immovable property. It may be that the owners of property are temporarily deprived of possession of what is rightfully their property and may also be subjected to other inconveniences, but all these considerations

(1) Criminal Ref. no. 65 of 1956 decided on 22nd May, 1956.

are subservient to the imperative necessity of preserving the peace."

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In my opinion an order passed under section 145, Criminal Procedure Code is in essence an executive order which has a judicial sanction behind it. In order to maintain the public peace the Magistrate has to see that the *status quo* is not disturbed by the use of force or violence. The inquiry conducted on the question of possession by a Magistrate is also of a limited character and it may be described as 'summary proceedings.' The opinion expressed by me above received support from the observations of HILL, J. in a Full Bench decision of the *Calcutta High Court* in *Krishna Kamni v. Abdul Jubbar* (1). HILL, J. observed:

"In entering upon a consideration of the section it is, I think, important to bear in mind the purpose with which it was enacted. It occurs in that part of the Code which relates to the prevention of offences, and its object is to bring to an end by a summary process disputes relating to land etc. which are in their nature likely, if not suppressed, to end in breaches of the peace. The maintenance of the public peace was the object before the mind of the legislature and where that supreme object is in view there can be no question but that the convenience and even the rights of individuals must at times be sacrificed for its attainment."

I am, therefore, of the opinion that the only purpose for the enactment of section 145, Criminal Procedure Code is to maintain public peace and not to decide disputes between contending parties. If any relief comes to such a party, it is only an incidental consequence of the primary purpose which is to keep the peace. When a Magistrate starts proceedings under

(1) (1903) I.L.R. 30 Cal. 155; 195.

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section 145, Criminal Procedure Code he does not do so to decide any question *inter se* between the parties to the dispute, but he is only concentrating on the question whether this dispute is likely to cause a breach of the peace or not. A party to a proceeding under section 145, Criminal Procedure Code is not in the position of a plaintiff in a civil suit and it has no right that the Magistrate must give a decision upon the question of possession. It is in this background that we should interpret the language of section 145(4), Criminal Procedure Code.

To me the language of the section appears to be quite clear and unequivocal. The legislature expressed itself in clear terms that the legal fiction which is created in favour of a party wrongfully dispossessed cannot be extended beyond two months prior to the passing of the preliminary order. A period of limitation is prescribed within which this legal fiction is permissible. Where the legislature in clear terms has expressed itself that a person may be deemed to be in possession only up to two months after dispossession, it is not open to a court of law to disregard that direction. The limitations are always fixed arbitrarily, but the courts of law have to follow them strictly.

*Q. 2. Is there any ambiguity in the language of section 145(4), Criminal Procedure Code which would authorize a court to give a different meaning to the words other than their natural meaning by introducing the principles of equity?*

It is a well known principle of interpretation of statutes that where the language of an Act is clear and explicit, the courts must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature. There

is no room left for interpretation or construction except where the words of a statute admit of two meanings. On a reading of section 145(4), Criminal Procedure Code. I am of the opinion that two meanings are not possible. There is only one meaning of the words used and, therefore, the natural meaning of these words must be given. In such a case there is no room for introducing any extraneous consideration for interpreting the words. The counsel for the applicant placed before the court the observations of M. N. MUKERJI, J. in *Sm. Sarat Kamini Dasi v. Nagendra Nath Pal* (1). MUKERJI, J. observed:

"I am of opinion that except perhaps in cases where injustice has been occasioned by a court by its own acts or oversights there is no scope for the application of any principles of equity in the administering of the statutes of limitation."

A few lines later in this very decision, he observed:

"In applying the principles of limitations the Indian Courts are not permitted to travel beyond the articles and the exceptions and provisos embodied in the Act itself, and that apart from the provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions."

The first observation of MUKERJI, J. is not applicable to the circumstances of this case. I will deal with this point at fuller length when I take up the third question.

*Q. 3. Can equitable principles be applied to an order passed under section 145 (6), Criminal Procedure Code?*

I have already mentioned above the purpose of an order passed under section 145, Criminal Procedure

(1) A.I.R. 1926 Cal. 65; 73.

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Code such an order is not a decision given on merits between two parties. It is of a temporary character and the aggrieved party can always go to the civil courts to seek its remedy. Section 145, Criminal Procedure Code is really meant to be used in those cases where not only a dispossession has taken place, but this dispossession is likely to lead to a breach of the public peace. It is this apprehension of a breach of the public peace which is the foundation of the Magistrate's jurisdiction, and not the wrongful act of dispossession. There can be several disputes in which a party has been dispossessed, but it cannot approach the criminal courts to seek redress, because there is no likelihood of a breach of peace. One can imagine that a party dispossesses another, but the dispossessed party is not in a position to offer any resistance. Obviously in such a case there is no apprehension of any breach of the public peace. The only remedy in such a case would be to approach the civil courts. It is for this reason that the Magistrate has to satisfy himself before initiating proceedings under section 145, Criminal Procedure Code whether there is an apprehension of breach of the peace or not. The principles of equity cannot be applied to the type of order which the Magistrate passes under section 145, Criminal Procedure Code. These principles are applicable only in those cases where the loss is almost irreparable or at any rate of such magnitude that it would amount to grave injustice. As observed by me above, an order passed under section 145, Criminal Procedure Code may at the most deprive the rightful owner of possession over property for a temporary period. It is true that if the words of the statute are capable of two interpretations, then the interpretation which is more equitable should be preferred, but an equitable interpretation against the clear language of the statute is not permissible. In *re. Hall* (1), CAVE, J. observed at page 141 :

(1) L.R. [1888] 1 Q.B. 137.



"A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out before the Court will construe a section in a way contrary to the natural meaning of the language used . . ."

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To the same effect are the observations of Lord ESHER in *re. Brockelbank*, (1). Lord ESHER observed:

"In this proviso the legislature have used language of the widest kind—"in all cases—so wide that, if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the legislature construed literally involves such consequences, the court has over and over again acted upon the view that the Legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless they have manifested that intention by express words."

It would be seen from the observations of Lord ESHER that the express words cannot be questioned even though the conclusion may be most revolting. It is only where the intention is not clearly expressed and the literal interpretation would lead to grave injustice that the principles of equity can be invoked. The language of section 145(4), Criminal Procedure Code is free from any ambiguity. Apart from it the natural interpretation of the words does not produce any grave injustice which is revolting to one's mind. If a person is deprived of property for a short time, it is not such a consequence which revolts one's mind. He can always seek his remedy in the proper court and there is no irreparable loss sustained by him. I am, therefore, of the opinion that the principles of equity do not

(1) L.R. [1889] 23 Q.B. 461.

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apply to an order passed by a Magistrate under section 145(4), Criminal Procedure Code.

I will now take up the last two questions together. These questions are:

*Q. 4. Does the law contemplate that the Magistrate should pass a preliminary order without reaching a subjective satisfaction that there is a likelihood of a breach of the peace?*

and

*Q. 5. Can the Magistrate be deemed to have reached a subjective satisfaction at a time when actually he had not reached it and when he was still gathering his information whether there was a likelihood of a breach of the public peace or not?*

It seems to me that the very basis of the Magistrate's jurisdiction under section 145, Criminal Procedure Code is his subjective satisfaction that there is an apprehension of a breach of the public peace. If this subjective satisfaction is not there, the Magistrate has no jurisdiction to entertain the application filed by any aggrieved party. I have no doubt in my mind that the Legislature intended that the Magistrate should initiate these proceedings only after he had reached this subjective satisfaction. If it were not so, every dispossessed person will try to seek a quick remedy by approaching the criminal courts. The Magistrate's jurisdiction starts only after he is satisfied that the dispute is one which is likely to lead to a breach of the public peace. Obviously the Magistrate cannot be satisfied on the allegations of a party alone. A party would like to have his case quickly decided and, therefore, claim that an apprehension of a breach of public peace exists. The Magistrate has, therefore, to seek his information from other sources also and it is only when he is assured

that there is such a likelihood that he initiates the proceedings and passes a preliminary order. I am, therefore, not prepared to accept that the Magistrate should pass the preliminary order almost immediately after a party presents its complaint to him. The Magistrate if it follows this course will turn himself into a civil court, which decides disputes about immovable property. It was observed in *Chunchu Narayana v. Karrapati Kesappa* (1):

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"We have already expressed our opinion that the legislature did not intend that any time should lapse between the presentation of the petition and the passing of the preliminary order *if the Magistrate is satisfied*. One should follow immediately the other."

It was, therefore, accepted in this decision that the satisfaction of the Magistrate must precede the passing of the preliminary order and after this satisfaction is reached then there should be no lapse of time between reaching such satisfaction and passing the preliminary order. In my opinion the preliminary order by itself indicates the time when this satisfaction was reached by the Magistrate. It is begging the question if it is argued that the satisfaction was reached much earlier, but the preliminary order was delayed. I see no reason for coming to the conclusion that the Magistrate had reached a subjective satisfaction very much earlier than the time when he passed the preliminary order. It is not for another court to determine when the Magistrate should have been subjectively satisfied. It is a matter which rests entirely with the Magistrate and if for some reason such as lack of suitable independent information or absence of confirmation by a police report the Magistrate is not willing to accept the allegation made by the complainant that there is imminent danger of a breach of the public peace, it cannot be said that the Magis-

(1) I.L.R. [1951] Mad. 951.

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of the public peace, it cannot be said that the Magistrate delayed coming to this conclusion and any fault was committed by him.

No doubt in the normal course the period of two months prescribed by the Legislature is more than ample for the Magistrate to make up his mind. The person who is aggrieved approaches the criminal courts almost immediately after dispossession and a period of two months is sufficient for the Magistrate to tap other sources of information in order to decide whether there is substance in the petition of the complaint or not. But where the Magistrate could not make up his mind within this time because corroborative information was not forthcoming, I do not think that the Legislature intended that he must have accepted the allegations made by the complainant without this corroborative information. After all a complainant has no inherent right to seek relief from the criminal courts. The Magistrate cannot be compelled to take cognizance of a case, although he feels that he has no jurisdiction to do so, as there is no satisfactory information to indicate that the dispute involves a breach of the public peace. I am, therefore, of the opinion that the doctrines of *nunc pro tunc* and *actus curiae neminem gravabit* cannot be applied to an order passed by a Magistrate under section 145(4), Criminal Procedure Code.

Lastly I will observe that I am in entire agreement with the view expressed in *Ayyan Padmanabhan v. Padmanabhan Nanu* (1).

I, therefore, concur in the order proposed and I will accept this reference.

*By the Court*—Accordingly we accept the reference and the recommendation of the learned Additional Sessions Judge. Possession of the land will be delivered to Ganga Baksh Singh.

*Reference accepted.*

(1) A.I.R. 1955 T.C. 262.

## APPELLATE CIVIL

*Before Mr. Justice Gurtu on a difference of opinion between Mr. Justice Tandon and Mr. Justice Nigam\**

TARA SINGH (APPELLANT).

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v.

STATE TRANSPORT AUTHORITY TRIBUNAL,

U. P. AND OTHERS (RESPONDENTS).

**Transport**—*Application for a stage carriage permit—Applicant not mentioning the date from which it is desired that the permit shall take effect—‘shall’ whether Mandatory or Directory—Motor Vehicles Act, 1939, s. 57(2), scope of.*

On 13th August, 1951, the appellant applied for a stage carriage permit on Bulandshahr-Khanpur-Amarpur route and his application was published on 25th August, 1951. In the meantime the Regional Transport Authority, on 3rd September, 1951, invited applications for three vacancies on the same route and the last date for applications was 18th September, 1951. The appellant did not file an application but other persons applied. On a consideration of all the applications on 25th October, 1951 the appellant was granted one of the permits but an appeal was filed against this permit and the State Transport Authority held that the appellants previous application could not be taken into consideration and the order granting the permit on such an application of the appellant was not justified and could not be held. The appellant filed a writ petition and a single Judge of this Court held that the appellant's application dated the 13th August, 1951 was a defective application which was not entitled to consideration at the time when other applications for permit were considered. The present appeal is against this order.

(*Per* GURTU and TANDON, JJ., NIGAM, J., dissenting).

*Held*, (i) that s. 57, sub-s. 2 of the Motor Vehicles Act, 1939 deals with two different situations (1) when it is made without a date having been notified and (2) where an application is made after a certain notified date.

(ii) the provision in s. 57(2) of the Motor Vehicles Act, 1939, that “an application for a stage carriage permit shall be made not less than six weeks before the date on which it is desired that the permit shall effect” does not require that an applicant under the first part of sub-s. 2 of s. 57 shall be bound to state the date from which it is desired that the permit shall take effect.

\*Sitting at Lucknow.

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(iii) that the provision for making the application six weeks in advance is at the most directory in nature and it does not either that an application not so made shall be invalid or the absence of a date from it will be fatal to its maintainability.

(Per NIGAM, J.).

(iv) that the word 'shall' in s. 57(2) is mandatory both as regards the first part and the second part of the section.

*Makhan Lal v. State of Uttar Pradesh* (1), relied on.

Special Appeal No. 30 of 1957 under Chapter IX Rule 10 of the Rules of the Court.

The facts appear in the judgment.

*Uma Shankar Srivastava* for the applicant.

The Standing Counsel for the opposite-parties 1 and 2.

*A. J. Fanthom* for the opposite-party no. 3.

The judgment of the case was delivered by—

TANDON, J: This special appeal is directed against an order passed by a learned single Judge of this Court in a Civil Miscellaneous Case No. 62 of 1955. The facts briefly are thus:

The appellant is a motor operator. Respondent no. 2, which is Regional Transport Authority, Meerut Region, invited applications for regular stage carriage permits on different routes comprised in the Meerut Region which were to be filled by the 15th of July, 1950. The appellant also made an application for one of the routes which was ultimately modified and named Bulandshahr-Khanpur-Amarpur route. This route was classified under the above name in October, 1950 and a strength of four permits was declared in its case. On 13th August, 1951 the applicant applied to the Regional Transport Authority for one of the permits on the said route. There were three vacancies on it at the moment.

(1) A.I.R. 1952 All. 437.

His application was then published in accordance with sub-section (3), of section 57 of the Motor Vehicles Act for objections etc. on 25th August, 1951. It does not appear that any objection was preferred against it. In the meantime, however, on 3rd September, 1951, the Regional Transport Authority issued a notification inviting applications for all the three vacancies and appointed 18th September, 1951, as the last date for submitting applications. A number of applications were received by the Regional Transport Authority in response to the above notification and all of them along with the application made by the appellants on 13th August, 1951, were published in the *Gazette*, over again as the applicant's application was concerned, for objections, etc. Subsequently the Regional Transport Authority in its meeting held on 25th October, 1952, considered the several applications and granted one of the permits in favour of the appellant. One Ram Saran Das also an applicant for a permit but he was unsuccessful. He, therefore, appealed to the State Transport Authority Tribunal against the order granting permits to two persons viz. (1) Sri Aidal Prasad Sharma and (2) Sri Tara Singh, the appellant before us. In the end, however, he did not press his appeal against Aidal Prasad Sharma which was thus confined against Tara Singh alone. The Tribunal constituted by the State Transport Authority heard the above appeal of Ram Saran Das and cancelled the permit granted to Sri Tara Singh on the ground that Tara Singh had made no application in response to the notice published by the Regional Transport Authority on 3rd September, 1951; Sri Tara Singh's application had been made earlier on 13th August, 1951, which for that reason could not be considered. It held:

"When the Regional Transport Authority had invited applications by its notice dated the 3rd

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September, 1951, it should not have taken into consideration any application which might have been lying in its office. The order granting a permit on the basis of such application was not justified and cannot be upheld."

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The Regional Transport Authority was accordingly directed to invite fresh applications for grant of a permit against the resultant vacancy.

The appellant then moved this court for a writ under Article 226 of the Constitution challenging the legality of the aforementioned order of the State Transport Authority. The grounds relied upon were that the said order was wholly illegal and was based upon an incorrect reading of the provisions of the Motor Vehicles Act and the Rules framed thereunder, and that it was without jurisdiction. The above petition came up for hearing before a learned Judge of this court who, by his order dated the 5th September, 1957, dismissed the same. The present appeal is directed against the above order.

In order to appreciate the controversy raised in the appeal it will be useful to refer immediately to section 57 of the Motor Vehicles Act, 1939. Sub-section (2) of this section has made provision for the making of applications for stage carriage permits. It is—

"An application for a stage carriage permit on a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates."

The above provision consists of two parts. Under the first part a person can make an application for a stage,



carriage permit, which he should make not less than six weeks before the date on which it is desired that the permit should take effect. The second part is where the Regional Transport Authority appoints date for the receipt of applications, as was done in the present case by its notification dated the 3rd September, 1951, the application has to be made on the date appointed by the Authority. It appears from the order of the State Transport Authority that it confined its attention in rejecting the appellant's application to the second part only of the above sub-section. It paid no consideration to the first part according to which a person is entitled to make an application for a stage carriage permit even where the Regional Transport Authority has issued no invitation. It rejected the application of the appellant because it had not been made on or during the dates appointed by the Regional Transport Authority. Before the learned single Judge this point was urged who while upholding that an application for a stage carriage permit can be made under either part of the section dismissed the appellant's prayer on the ground that the application, which he had made on 13th August, 1951, failed to specify the date from which it was desired that the permit should take effect. The absence of this particular from the application was held by him to be fatal. He, therefore, declined to interfere with the order made by the State Transport Authority.

The appellant has challenged that it was necessary for him to mention in his application the date from which he desired the permit to take effect, he, consequently, maintained that the application made by him was a valid application.

One of the questions which will, therefore, arise in the present appeal is whether it was incumbent upon

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the appellant to state in his application made to the Regional Transport Authority the date from which he desired that the permit should take effect and was the absence of this detail fatal to his application.

Permits for public service vehicles are granted under Chapter IV of the Motor Vehicles Act, 1939. Section 42 makes it obligatory on every owner of a transport vehicle not to use any vehicle in any public place, save in accordance with the conditions of a permit granted by a Regional or State Transport Authority in respect thereto. Section 45 requires such applications to be made to the Regional Transport Authority of the region concerned. There are different sections applicable to different types of vehicles.

Section 46, which is relevant in the present case, concerns applications for stage carriage permits. It is as follows:

"46. An application for a permit to use a motor vehicle as a stage carriage. . . . shall contain the following particulars, namely:

(a) the type and seating capacity of the vehicle in respect of which the application is made ;

(b) the route or routes on which or the area within which it is intended to use the vehicle ;

(c) the time-table, if any, of the service to be provided ; and

(d) such other matters, as may be prescribed."

This section has since been amended, but the un-amended version as given above is relevant in the present inquiry.

Section 47 lays down the matters which a Regional Transport Authority shall consider in granting or refusing a stage carriage permit. There is no other

section dealing with the grant or refusal of stage carriage permits, at least so far as considerations relevant in the present case arise. And according to section 47 the Regional Transport Authority will have regard to six matters which have been enumerated in clauses (a) to (f) in the section. It need only be mentioned that none of the six grounds mention that an application will be rejected, if it does not specify the date from which it is desired a permit to take effect.

The next relevant provision is section 57. Sub-section (2) of this section has already been noticed earlier. Sub-section (3) provides that on receipt of an application for a stage carriage permit the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted, and the date, not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations received, will be considered. The rest of the provisions of this section have no bearing on the present controversy.

Under section 58(1) the Regional Transport Authority has to fix the period of validity of the permit granted by it which shall be not less than three years and not more than five years. The authority to fix the period of validity of a permit and consequently the date also from which it will commence thus belongs to the Regional Transport Authority. There is nothing in this section—and my attention has not been invited to any other provision of the Act or of the rules—according to which the Regional Transport Authority may be bound in case it grants an application for a stage carriage permit to commence its validity from the date desired by

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an applicant. Reference may be made here to clause (b) of rule 50 of the U. P. Motor Vehicle Rules which says that "in granting any permit the Regional Transport Authority shall have power to modify the terms of the application in a reasonable degree and in such a case the application shall be deemed to be an application for the permit in the form granted." A power thus belongs to the Regional Transport Authority to modify the terms also of an application for a stage carriage permit and this power will apparently include the power to alter the date also from which an applicant might have asked the permit to be given to him.

It will be necessary to refer to this fact in the discussion later.

Section 68 of the Act confers power on the State Government to make rules for the purpose of carrying into effect the provisions of Chapter IV in which the above provisions exist. In pursuance of the said power, the State Government promulgated the U. P. Motor Vehicle Rules 1940. Clause (c) of sub-section (2) of section 68 makes specific mention that the rules may provide the forms to be used for the purposes of Chapter IV, including the forms of permits. Accordingly this has been done in rule 50 which to the extent it is relevant is as follows:

"50. *Application for permits—Forms of—*(a)  
Every application for a permit in respect of a transport vehicle shall be in one of the following forms, that is to say:

(1) in respect of a particular carriage in Form P St. PA. . . . . "and shall be addressed to the Secretary of the Authority at the regular office of the Authority."

The form referred to above has also been prescribed. A number of particulars have to be supplied in this form. There is, however, no provision in it requiring

an applicant to state the date from which he desires the permit asked for to take effect item no. 16 which alone, may be relevant requires the applicant to state the period in years during which the permit is desired to be effective. There is nothing in this item either to force the conclusion that an applicant under the first part of sub-section (2) of section 57—it is not denied that an application under this part also has to be made on this form—shall be bound to state the date from which it is desired that the permit shall take effect.

Before I proceed further I might refer back once again to section 46 of the Act which in clause (d) has made provision for any other matters considered necessary to be contained in an application to be prescribed by rules. Rule 50 prescribing the form in which an application has to be made has evidently been framed in view of the above provision. No other rule has been pointed out to me concerning matters which have to be included in an application for a stage carriage permit. The situation that exists therefore is that section 46 itself does not require that an application for a stage carriage permit shall specify the date from which the permit is desired and so also the rules that have been framed in obedience to it have not made any such provision.

Having thus noticed the relevant provisions of the Act and the rules, it is to be seen whether the appellant's application which, it is conceded at both hands was an application under the first part of sub-section (2) of section 57, was fatally defective on account of the absence from it of the date from which the permit was desired to take effect. This sub-section says that such an application shall be made not less than six weeks before the date on which it is desired that the permit shall take effect. The presence of the word "shall" is considering to make it imperative on an applicant to

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make the application not less than six weeks before and as this cannot be judged except by mentioning the date also from which the permit is desired to take effect, the conclusion is drawn that the application must further contain the date also. It will have to be confessed that the sub-section does not in so many words provide that the application shall contain the date from which it is desired that the permit shall take effect. But the contention is that this condition should be read in it because the application has to be made not less than six weeks before such date.

I have very carefully examined the sub-section, as well as the arguments urged on behalf of the State, but I am unable to accept the above contention. The plain language of the sub-section only requires that an application shall be made not less than six weeks before the date on which it is desired that the permit shall take effect. It does not demand the desired date also to be stated in the application. In the absence of any provision in that behalf in the section it is, in my opinion, not open to the applicant to impute to the legislature an intention not expressed by it. If the legislature wanted that an application should state the date from which it is desired that the permit shall take effect there was no impediment in its way to have said so. It is not a case where the contents of the application have not been prescribed in the Act. Section 46 makes provision for the particulars which shall be contained in an application for a stage carriage permit. None of the three particulars (a) to (c) demands this particular to be given and the rules also, including form of application prescribed under the Act, do not ask the applicant to state the date from which he desires the permit to take effect, though he is asked to state the number of years for which he wants the permit. And this latter information is apparently asked from him in view of the

provision in section 58 which gives to the Regional Transport Authority the power to fix the period of validity of the permit from three to five years.

The case of *Makhan Lal v. State of Uttar Pradesh* (1), which is a two judge decision, was cited before the learned single Judge in support of the proposition that the Regional Transport Authority was bound to consider the appellant's application even though it had been presented prior to the issue of the notification by it. It was held in that case:

"If anyone had already presented an application which could be considered to comply with the requirements of the first alternative mentioned in section 57(2), it is incumbent on the Regional Transport Authority to consider that application and it is not competent for it to ignore that application simply because it subsequently decides to fix a date for the presentation of applications under the second alternative."

The learned single Judge (who was a party to that decision) has with reference to it observed in the present case that—

"One of the requirements was that the petitioner should have sought a permit which was to become effective not less than six weeks after the date of the application. There is no mention at all in any affidavit that in that application the petitioner had asked for a permit which was to take effect six weeks or more after the presentation of that application."

It seems that the learned Judge considered that the absence from the application of this information was fatal to its maintainability. In other words, there was a legal compulsion on an applicant to mention the date

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in his application which, if he has not done, is liable to be dismissed on that ground alone.

With very great respect, my own reading of section 57(2) does not warrant this conclusion. As already pointed out its plain language does not ask the date to be entered, and to my mind, it is not possible to read it by implication either. The insistence in the provision is on the fact alone that the application shall be made not less than six weeks before the date from which it is desired that the permit should take effect. It is thus in the nature of a direction for the convenience and benefit of the applicant himself who should, in order to avoid a disappointment, make the application well in advance. He is nowhere required to state the date. Therefore, if he fails to make the application in sufficient time the application itself is not rendered invalid though he may not get the permit at the desired time.

In any case, failure to state the date in the application was of no significance in the present case as it was nowhere alleged or shown that the petitioner desired the permit to take effect from an earlier date. If at all, since the application itself was considered by the Regional Transport Authority long after the expiry of the period of six weeks since its meeting, the fact that the applicant still appeared to press his claim for a permit before the Regional Transport Authority justified the conclusion that he did not desire the permit to commence from a date less than six weeks before. For the above reasons it too could not be said that the application was against the spirit of section 57(3).

It was also contended that the presence of the word "shall" made it a mandatory provision and its compliance is necessary for the validity of the application. No doubt, the word "shall" is used in an imperative sense but it is not necessarily so always. When a law



requires that something shall be done but it does lay down what the consequences shall be of non-compliance the legislative intention has to be read from a number of circumstances. The mere fact that the word "shall" has been used in declaring is imperative. If the whole aim and object of the legislature will be defeated by non-compliance of the particular thing the provision is undoubtedly imperative. But it is not necessarily so otherwise. In deciding, therefore, whether the particular provision is imperative or directory one has to see if the non-compliance would result in defeating the aim and object of the Act. Where it does not, an imperative intention is not attributed specially where inconvenience or injustice would result to innocent persons. The aim and object of the Motor Vehicles Act including the grant of permits is regulation of motor traffic on public road according to the Scheme of the Act the Regional Transport Authority or any other authority under the Act is vested with the power to allow permits, fix their number, their timetable and all other things necessary for the convenient running of service. No advantage can, therefore, result to a defaulter, i.e. one who has not mentioned the desired date in his application by omitting this particular. On the contrary, inconvenience and injustice can accrue to him because if he mentions the date from which the permit is desired, as he has to state the number of years for which the permit is asked ; he may not get a permit for the desired period not by any fault of his but owing to the non-assembly of the Regional Transport Authority or any delay or default in the procedure prescribed in that connection to be gone through. In this case it is also worthy of consideration that the Act or the Rules do not make any express provision for disobedience of this particular thing in the application for permit which is to be granted or refused on matters referred to in clauses (a) to (f) of sub-section (1) of section 47.

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It is also significant that the rules made by the State Government, which has power under section 68 to make them for the purpose of carrying into effect the provisions of Chapter IV, have too not required an applicant to state the date. The provision in sub-section (2) of section 57 regarding an application has been given effect to by rule 50 but this rule also has not made provision for stating the desired date anywhere; on the contrary, it has given power to the Regional Transport Authority to modify the particulars.

For everyone of these reasons, I am of the view that the provision about making the application six weeks in advance is at the most directory in nature and it does not either that an application not so made shall be invalid or the absence of a date from it will be fatal to its maintainability. I will, therefore, disagree, with great respect, with the view of law to the contrary laid down by the learned single Judge held in the judgment appealed against. In *Makhan Lal's* case (1), it was held that an application made previous to the invitation for application issued by the Regional Transport Authority can also be considered by the Regional Transport Authority along with the applications received as a result of such invitation. I entirely agree with this view of section 57. The Regional Transport Authority was, therefore, perfectly within its rights in considering this application and the State Transport Authority was clearly wrong in holding that the Regional Transport Authority was incompetent to consider the appellant's application. It, therefore, committed a manifest error which has also resulted in an injustice to the appellant whose permit was cancelled in this manner.

In the result, I will allow the appeal, set aside the order passed by the learned single Judge and shall also quash the order of the State Transport Authority dated

13th June, 1955. Since the appeal by Ram Saran Das had been allowed by the State Transport Authority on this preliminary point and it did not enter into merits, it is further directed to readmit the appeal and to dispose it of in accordance with law. The appellant will get his costs from the respondents.

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NIGAM, J: On 13th August, 1951, the appellant made an application for a stage carriage permit on the route Bulandshahr-Khanpur-Amarpur. This application was published for objections on 25th August, 1951. Before any orders could be passed on this application, the Regional Transport Authority on 3rd September, 1951, invited applications for three vacancies on the same route. The last date fixed for presenting applications was 18th September, 1951. The petitioner filed no application. Other persons made applications. The Regional Transport Authority considered the applications that were received and the application of the appellant on 25th October, 1952, and the appellant was granted one of the permits. An appeal was preferred and the State Transport Authority came to the conclusion that as the appellant had not submitted any application in response to the notice issued by the Regional Transport Authority, his previous application could not be taken into consideration and the order granting a permit on the basis of such application was not justified and could not be upheld. At that time it appears that the decision of this Court in *Makhan Lal v. State of Uttar Pradesh* (1), was not brought to the notice of the State Transport Authority. That decision held:

"If any one had already presented an application which could be considered to comply with the requirements of the first alternative mentioned in

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section 57 (2), Motor Vehicles Act, it was incumbent on the Regional Transport Authority to consider that application and it was not competent for it to ignore that application simply because it subsequently decided to fix a date for the presentation of applications under the second alternative."

The appellant then filed a writ petition and a learned single Judge held that the order of the State Transport Authority was entitled to be sustained on the ground that the appellant's application dated 13th August, 1951, was a defective application and not entitled to consideration at the time other applications for permit were considered. The ground for this opinion was that the appellant had not in his application for the permit mentioned the date from which he desired the permit. It is against this decision that the present appeal has been presented.

The only question for our determination is whether the application was valid and entitled to be considered.

Four contentions have been urged before us. The learned counsel has referred to the provisions of section 46 of the Motor Vehicles Act (Act IV of 1939) as it stood on that date. This section reads:

"An application for a permit to use a motor vehicle as a stage carriage (in this Chapter referred to as a stage carriage permit) shall contain the following particulars, namely—

. . . . .  
(d) such other matters as may be prescribed.  
ed."

It is pointed out that this section did not specifically direct the date from which the permit was desired to be mentioned. In clause (d) the section directed mention of such other matters as may be prescribed. Reference has been made to rule 50 of the U. P. Motor

Vehicles Rules. That rule so far as it is relevant for our purpose is as follows:

"Every application for a permit in respect of a transport vehicle shall be in one of the following Forms, that is to say:

(i) in respect of a particular stage carriage in Form P St. PA. . . . ."

This form is also prescribed. The only relevant entry is no. 16 which is:

"I/We desire a permit valid for . . . . years," This form also does not require the date from which the permit is desired to be mentioned. The argument is that the law does not require that the date from which the permit is desired should be mentioned. I am unable to agree with this contention. Section 57 (2) of the Motor Vehicles Act (Act IV of 1939) reads:

"An application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect . . . ."

I am unable to subscribe to the view that the appellant was bound only to comply with the requirements of section 46 and rule 50. It may be that other sections require certain information to be given and the appellant would not be entitled to urge that he was not required to give it merely because the particular information is not required by section 46 or rule 50 of the State Rules. I am unable to confine the word "prescribed" to mean "prescribed by rules". It may be that the prescription is by some other section, after all the rules have force as if they were incorporated in the Act itself and if the requirement is in any other section of the Act itself, that requirement cannot be attached lesser importance than if it

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were prescribed under the rules framed under the rule making authority.

The suggestion that the prescribed form itself does not clearly direct mention of the date from which the permit is desired is, in my opinion, of no avail. Section 57(2), as has been previously held, clearly deals with two classes of applications. The application may be made voluntarily by the applicant for the permit and then it would come under the first part of section 57(2) or the application may be made in response to an invitation by the Regional Transport Authority in which case it would come under the second part of section 57(2) of the Indian Motor Vehicles Act. The form prescribed is one applicable to both the contingencies. No date of the desired commencement of the permit need be mentioned in an application under the second part of clause (2) of section 57. At best the omission to require the information in the form may be an extenuating circumstance in favour of the appellant, but it cannot furnish a ground for the contention that the appellant is not required to give that information.

The second contention is that section 47 lays down the points that have to be considered by the Regional Transport Authority when considering the applications for permits. It is pointed out that there is no mention of the date from which the permit is desired among the matters that should be considered. I am unable to attach any weight to this contention. The question whether the application is a proper and valid one has to be determined in terms of the other provisions of the Act. The matters mentioned in section 47 are to be considered when considering the valid applications. It is obvious that applications which are not on proper form or which do not furnish the particulars required by section 46 or those required in the form prescribed under rule 50 will not be entitled to consideration at

the time when applications are being considered under section 47. It has not been suggested, and I think cannot be suggested, that all applications whether in proper form or not, whether furnishing the information required by section 46 or not, are to be considered when the matter is being considered by the Regional Transport Authority in terms of section 47 of the Motor Vehicles Act.

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In the arguments it was urged that in certain cases difficulty would be caused by the applicant mentioning the date from which he desires the permit to take effect. There may be delay in the Regional Transport Office and that office may not be able to decide on the application before the "desired" date. Section 58(1) requires the Regional Transport Authority to grant the permit for a minimum period of three years and thus either the three years period would be curtailed or the permit would be valid beyond a date desired by the applicant. This argument was answered by my brother Tandon in the course of the hearing. It is sufficient to refer to rule 50(b) which permits the Regional Transport Authority to modify the terms of the application in a reasonable degree. In that case the Regional Transport Authority will have full power to grant the permit for a period of not less than three years and not exceeding five years from the date from which the permit was in fact granted.

It was next urged that the word "shall" in section 57 (2) is merely directory and not mandatory. Therefore, an omission to mention the date from which it is desired that the permit shall take effect will not invalidate the application. It was again suggested that neither the section nor the rule requires the date to be mentioned. I have already dealt with that argument. It was next suggested that there was no ground for holding that it was a mandatory direction of the Legislature that the

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*By the Court:*—In view of the divided opinion between us the following points are stated for hearing by one or more Judges as may be nominated by the Hon'ble the Chief Justice for hearing of those points:

(1) Does the provision in section 57(2) of the Motor Vehicles Act, 1939, that "an application for a stage carriage permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect" require that that date shall be stated in the application or otherwise?

(2) If the answer to the first question be in the affirmative, is the requirement of stating the date mandatory or merely directory?

(3) Is an application which does not mention the date not, an application complying with the requirements of the first alternative mentioned in section 57(2) of Motor Vehicles Act (Act IV of 1939)?

GURTU, J.:—The following points have been referred to me upon a difference of opinion between my brother TANDON and my brother NIGAM:

(1) Does the provision in section 57(2) of the Motor Vehicles Act, 1939, that "an application for a stage carriage permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect" require that that date shall be stated in the application or otherwise?

(2) If the answer to the first question be in the affirmative, is the requirement of stating the date mandatory or merely directory?

(3) Is an application which does not mention the date not an application complying with the requirements of the first alternative mentioned in



section 57(2) of the Motor Vehicles Act (Act IV of 1939) ?

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The reference of these points has been made under the following circumstances. A petition under Article 226 of the Constitution of India was made by Tara Singh seeking the issue of a writ of *certiorari* for quashing an order passed by the State Transport Authority Tribunal, Uttar Pradesh, dated 13th June, 1955. It appears that a new route for running stage carriages was decided upon by the authorities in the year 1950. According to the petitioner this new route was created in October, 1950, but in the counter-affidavit it was suggested that this new route was decided upon on 27th/28th November, 1950. On 13th August, 1951 the petitioner made an application for a permit for running a stage carriage on this new route. That application was put up for objections in accordance with the procedure prescribed on 25th August, 1951. Before final orders could be passed on that application the Regional Transport Authority on 3rd September, 1951 issued a notification inviting applications for three vacancies of stage carriage permits on this new route. The last date fixed for the receipt of such applications was 18th September, 1951. The petitioner did not make any application in response to this notification. Other persons applied. The Regional Transport Authority considered all the applications including the application of the petitioner which he had made on 13th August, 1951 and one permit was granted to the petitioner on the basis of his aforesaid application which, as already pointed out, was made prior to the notification and as far back as 13th August, 1951 when the petitioner had come to know of the sanctioning of the new route. Thereupon an appeal was filed by one of the other applicants for a permit before the State Transport Authority Tribunal and the State Transport Authority Tribunal on such appeal set aside the order of the Regional Transport

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Authority granting a permit for a stage carriage to the petitioner on the basis of his application dated the 13th August, 1951 on the ground that the said application had not been presented after the issue of the notification above referred to inviting applications and that, therefore, the said application of 13th August, 1951 was not a valid application and the Regional Transport Authority had no power to grant a permit to the petitioner. In consequence of the order of the State Transport Authority Tribunal aforesaid the present writ petition was filed.

It came up for hearing before a learned Single Judge and then a special appeal came up before a Bench consisting of my brethren TANDON and NIGAM. The question that arose before them was whether the application dated the 13th August, 1951 was an application made in accordance with section 57(2), Part I of the Motor Vehicles Act, 1939. My learned brother TANDON was of the view that it was a proper application whereas my learned brother NIGAM took a contrary view. In consequence I have now to decide whether the application dated the 13th August, 1951 was a valid application according to section 57(2), Part I of the Motor Vehicles Act. No one now argues that it was an application under Part II of section 57(2).

I may point out that there is no dispute that if the application aforesaid is a valid application under section 57(2) Part I then it is an application which had to be considered by the Regional Transport Authority.

Whether or not the application of 13th August 1951 is a valid application under Part II of section 57(2) has got to be decided having regard to the terms of section 57(2) of the Motor Vehicles Act, 1939. I will now quote sub-sections (1) and (2) of section 57 of the Motor Vehicles Act. They are as follows:

"(1) An application for a contract carriage permit or a private carrier's permit may be made at any time.

(2) An application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates."

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The rest of the section is not material for the purpose of the point of issue.

It will appear from a reading of section 57 of the Motor Vehicles Act that it contemplates two categories of applications. The first part of the section deals with an application for a stage carriage permit or a public carrier's permit to be made not less than six weeks before the date on which it is desired that the permit shall take effect. The second part of sub-section (2) deals with an application which is to be made after the Regional Transport Authority has appointed dates for the receipt of applications. This is as already indicated nobody's case now that the application in question dated 13th of August, 1951, was made under the second part of sub-section (2). It was admittedly made under the first part of sub-section (2) because it was made before the notification of a date inviting applications. The point of difference between my brethren is as to whether in the application which the petitioner made on the 13th August, 1951 he should have expressly mentioned the date from which he desired that the permit for which he had applied should be effective or should operate. My brother TANDON is of the view that neither sub-section (2) of section 57 of the Motor Vehicles Act nor the rules framed under the authority of section 68 of the said Act demand that the applicant should state the date from which he wishes the permit applied for to operate or to be effective.

I think that at this stage it would be advisable for me to quote section 46 of the Motor Vehicles Act, 1939. It runs as follows:

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"46. An application for a permit to use a motor vehicle as a stage carriage (in this Chapter referred to as a stage carriage permit) shall contain the following particulars, namely:

(a) the type and seating capacity of the vehicle in respect of which the application is made;

(b) the route or routes on which or the area within which it is intended to use the vehicle;

(c) the time-table, if any, of the service to be provided; and

(d) such other matters as may be prescribed."

The word "prescribed" has been defined by section 2(21) of the Act and means prescribed by rules made under this Act".

Then I may quote Rule 50 of the Motor Vehicles Rules 1940 as framed:

"50. *Application for a permits—Forms of—*

(a) Every application for a permit in respect of a transport vehicle or a private stage carriage shall be in one of the following Forms that is to say—

(i) in respect of a particular stage carriage in Form P. St. P. A.,

and shall be addressed to the Secretary of the Authority at the regular office of the Authority.

(b) In granting any permit the Regional Transport Authority shall have power to modify the terms of the application in a reasonable degree and in such a case the application shall be deemed to be an application for the permit in the form granted."

Thereafter I would like to point out that Form P. St. P. A. drawn up under rule 50(a) (i) of the U. P. Motor Vehicles Rules, 1940, and published by the Government of Uttar Pradesh in 1957 does not show that the date from which a permit is to be effective has to be entered anywhere in that Form.

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The relevant sections and rules now having been set out it remains for me to consider whether either the relevant sections or the relevant rule or the relevant form demand that a specific date from which the permit is to be effective is required to be specified in the application for a permit desired under the 1st part of section 57(2). It will be apparent from a consideration of the material provisions herein before quoted that there is no express provision requiring the specification of a date. The argument, however, which has been advanced before me is that the language of section 57(2), first part, which is to the effect that an application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, clearly demands, that the date when the permit shall take effect should be specifically mentioned. On the other hand, the contention is that the six weeks' period mentioned in sub-section (2), first part, has been mentioned in order to make it clear that no right to receive a permit will in any case accrue to an applicant until six weeks have expired from the date of his application. It seems to me that there is substance in the latter contention. Moreover, it seems to me that when a person avails himself of such a provision as is contained in section 57(2), first part, and applies for a permit then, in the absence of anything to the contrary in his application, it must be presumed that he is desirous of obtaining a permit which would take effect on the expiry of six weeks from the date of his application.

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For if such a person desired that his permit should take effect at some remoter period beyond six weeks it is likely that he would mention it and in view of section 57(2) he could not mention a date from which the permit should be effective which was within six weeks of the making of the application for he would have no such right. In my view, therefore, having regard to the fact that neither in the rules nor in the form framed nor in section 46 of the Motor Vehicles Act is it indicated that there should be a specific mention of the date from which it is desired that the permit should take effect, in the absence of specification of any date, it should be assumed that the applicant desires the permit to be effective on the expiry of the six weeks' period indicated in section 57(2), first part of the Act one is entitled to presume that if a person has made an application under section 57(2) of the Act and has not specified the date when he desires the permit to take effect then he is clearly intending that the permit to be granted to him should take effect at the end of the period of six weeks from the date of his application.

Therefore, in my view the application dated the 13th of August, 1951, was not an invalid application merely because there was no express specification of the date therein. There is a clear specification by implication.

I would accordingly answer question no. 1 referred to me in the affirmative. In consequence question no. 2 does not need an answer. In regard to the third question my view is that an application which does not mention the date is still an application which complies with the requirements of section 57(2), first part.

I would like to add here that although sub-section (2) of section 57 has not been broken up in two parts by the Act yet I have constantly referred to it as if it was in two parts for the sake of convenience because the section clearly deals with two different situations, (1)

where an application is made after a certain notified date and (2) when it is made without a date having been notified.

I accordingly direct that my answers be returned to the Bench concerned.

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BY THE COURT:—Upon a difference of opinion having arisen between us we formulated certain points for inviting the opinion of a third Judge which has now been received. In view of the opinion received the application under section 57(2) of the Motor Vehicles Act was a valid application. The appeal is accordingly allowed and the order of the learned Single Judge is set aside and as a result the order of the State Transport Authority, dated the 13th June, 1955 is quashed. The State Transport Authority is further directed to readmit the appeal and to dispose it in accordance with law. The appellant will get his costs from the respondents.

*Appeal allowed.*

### (FULL BENCH) CRIMINAL REVISION

*Before the Honourable O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Chaturvedi.*

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**Criminal Revision**—*Power of High Court to recall its decision in—Rehearing, if and when permissible—Code of Criminal Procedure 1898, ss. 369 and 561-A.*

A criminal revision was heard and decided on merits by the High Court without hearing the applicants or their counsel as no one appeared when the case came up for hearing. The counsel for the applicants who had filed an application for the adjournment of all his cases, including the revision, during that interval, later moved an application for a rehearing of the re-



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vision. The competence of the High Court to entertain such applications being referred to the Full Bench as a general proposition:

*Held (Per DAYAL and CHATURVEDI, JJ., MOOTHAM, C. J., contra)*—(i) that by virtue of its inherent power reserved under s. 561-A and excluded from its purview by s. 369 of the Code of Criminal Procedure, the High Court can revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same.

(ii) that this power has, however, to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests laid down in s. 561-A itself, viz “to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice”.

*Talab Haji Hussain v. Madhukar Purushottam Mondkar* (1) followed, *Sri Ram v. Emperor* (2) adopted.

Observations in *U. J. S. Chopra v. State of Bombay* (3) distinguished on the ground that the same did not refer to the inherent power of the High Court.

(*Per MOOTHAM, C. J.*)—As soon as its judgment in a criminal revision case has been signed and sealed, the High Court becomes *functus officio* and has no power to revoke, review, recall or alter the order it has already made. Decisions to the contrary are based on the erroneous assumption that the provisions of the Code are subject to s. 561-A.

The rule would, not, however, apply where an order has been passed without jurisdiction. Such a judgment or order is a nullity and the case must be reheard.

*Dicta* of the Supreme Court in *Chopra v. State* (3) followed.

Criminal Revision No. 287 of 1956.

*R. C. Ghatak*, for the applicants.

*B. N. Katju*, for the State.

MOOTHAM, C. J.:—The question which has been referred to this Bench is: “whether this Court has power to revoke, review, recall or alter its own earlier decision in a Criminal Revision and rehear the same? If so, in what circumstances?”

It is common ground that there is no section of the Code of Criminal Procedure which specifically confers such powers on this Court, but it is contended that the Court has an inherent power to review a judgment or

(1) A.I.R. 1958 S.C. 376.

(2) A.I.R. 1948 All. 106.

(3) (1955) 2 S.C.R. 94, 119, 130, 136



order previously made by it on a criminal revision application if it considers it expedient to do so in order to secure the ends of justice and that that power has been preserved by section 561-A. There is authority which supports this view but, with great respect, I do not think that the argument is well founded.

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Section 561-A was introduced into the Code by the Criminal Procedure Code (Amendment) Act, 1923, and it provides that "Nothing in this shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice". At first sight this section commencing as it does with the words "notwithstanding anything in the Code" might be construed as empowering a High Court, irrespective of the provisions of the Code, to make such order which it considers necessary to secure one or more of the objectives specified in the section. This view however is erroneous. The section confers no new powers on the Court; it only provides that those which the Court already inherently possessed shall be preserved and was inserted (as said by the Privy Council in *King Emperor v. Khwaja Nazir Ahmad* (1) lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Code or (as pointed out by the Supreme Court in *Talab Haji Hussain v. Madhukar Purshottam Mondkar* (2) for the purpose of removing judicial doubts as to whether the High Courts prior to 1923 retained their inherent powers. The inherent powers of the Court are powers which can be exercised by the Court in addition to the specific powers conferred on it by the Code; but they do not authorize the Court to disregard what is provided by the Code either expressly or by necessary implication.

(1) 1945 A.L.J. 47.

(2) A.I.R. 1958 S.C. 376.

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There can be no conflict between the specific powers and the inherent powers of the Court, for the latter operate only in the field not covered by the former.

The scope and nature of the inherent powers of a High Court have recently been summarized by the Supreme Court in *Talab Haji Hussain v. Madhukar Purshottam Mondkar* (1). GAJENDRAGADKAR, J., delivering the judgment of the Court in that case said, at page 378:

" It is obvious that this inherent power can be exercised only for either of the three purposes specifically mentioned in the section. This inherent power naturally cannot be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provision of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that s. 561-A can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. . . . It is only where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any Court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent power under section 561-A."

The High Court could not therefore in 1945 grant bail in the case of a convicted person who desired to appeal to the Privy Council as the law with regard to bail was covered by section 426 and Chapters XX—XIX of the Code as then in force [see *Jairam Das v. The King Emperor* (2)]: nor can it in exercise of its inherent

(1) A.I.R. 1958 S.C. 376. .

(2) 1945 A.L.J. 340.

power quash a commitment otherwise than on a point of law *Khushi Ram v. Hashim* (1).

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The first question therefore is whether the inherent power which the applicant asserts that this Court possesses to review its own order or judgment dismissing an application in revision is in respect of any matter covered by a provision of the Code, or if its exercise would be inconsistent with any provision therein.

The sections which require consideration are sections 369, 424 and 430. Section 369 provides that subject to certain qualifications or exceptions, not now material, no Court "when it has signed its judgment, shall alter or review the same, except to correct a clerical error". It has commonly been assumed (even, it would appear, by the Privy Council in *Jairam Das's* case) (2) that this section applies also to the judgments of an appellate court, but it is clear that that is not so: *U. J. S. Chopra v. State of Bombay* (3). The purpose of section 369 is only to prescribe finality for the judgments of the trial court so far as that court is concerned. Section 424 makes the rules contained in Chapter XXVI of the Code (which includes section 369) applicable as far as may be practicable to the judgments of an appellate court, other than a High Court. The finality of orders on appeal is the subject of section 430 which provides that all judgments and orders passed by an appellate court on appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII; that is to say except in the case of an application by the State Government against an order of acquittal or in a case in which the Court exercises its powers of reference or revision. It follows therefore that section 430 does not in terms give finality to the judgments of a High Court passed in the exercise of its revisional jurisdiction.

(1) Supreme Court Criminal Appeal no. 154 of 1957.

(2) 1945 A.L.J. 340.

(3) (1955) 2 S.C.R. 94.

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It cannot therefore be said that the inherent power which the Court is said to possess to review a judgment made in the exercise of its revisional jurisdiction relates either to a matter covered by a specific provision of the Code or that its exercise would be inconsistent with any specific provision. That does not however conclude the matter. A judgment of a High Court passed on an appeal (as distinguished from a judgment passed on a reference or revision) is final and cannot in my opinion be reviewed by the Court in the exercise of its inherent powers, for the exercise of such powers would be inconsistent with the principle of finality embodied in section 430. The principle of finality applies however, as the Supreme Court has pointed out in *Chopra's* case, no less to a judgment or order made by a court in the exercise of its revisional powers. DAS, J., says at page 119—

"It is also true that although the revisional power is not expressly or in terms controlled either by section 369 or section 430, the general principle of finality of judgments attaches to the decision or order of the High Court passed in exercise of its revisional powers."

and BHAGWATI and IMAM, JJ., says at page 130—

"Section 430 does not in terms give finality to the judgments of the High Court passed in exercise of its revisional jurisdiction, but the same principle would apply whether the High Court is exercising its appellate jurisdiction or its revisional jurisdiction."

It accordingly appears to me impossible to urge that the High Court has an inherent power to review a judgment or order passed by it in the exercise of its revisional jurisdiction, although it has no such power to review a judgment passed by it in its purely appellate jurisdiction. Both cases stand on the same footing; in

both, the bar to the exercise of a power to review is the principle of finality. High authority for this view is to be found in the majority judgment in *Chopra's case* (1). Thus, at page 130, it is observed:

"This principle of finality of criminal judgments therefore would equally apply when the High Court is exercising its revisional jurisdiction. Once such a judgment has been pronounced by the High Court either in the exercise of its appellate or its revisional jurisdiction no review or revision can be entertained against that judgment and there is no provision in the Criminal Procedure Code which would enable even the High Court to review the same or to exercise revisional jurisdiction over the same.",

and at page 136—

"The order dismissing the appeal or criminal revision summarily or *in limine* would no doubt be a final order of the High Court not subject to review or revision even by the High Court itself . . . ."

It is true that in *Chopra's case* (1) the question before the Court was whether an appellant whose appeal had been summarily dismissed by the High Court was entitled to show cause against his conviction under section 439(6) of the Code in the event of the State Government filing an application for enhancement of sentence, and that section 561-A was not considered; but I apprehend that the dicta of their Lordships are nonetheless binding on the Court.

The view that a High Court has no inherent power to review its decision in a Criminal case was, I think, accepted by all the High Courts prior to 1923: (see *Queen Empress v. Durga Charan* (2), *Emperor v.*

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(1) (1955) 2 S. C. R. 94.

(2) (1885) I.L.R. 7 All. 672.

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*Govind Sahai* (1), *Queen Empress v. C. P. Fox* (2), *In the matter of the Petition of F. W. Gibbons* (3); *Rajjab Ali v. Emperor* (4); *Kunhammad Haji* (5); and this Court has taken the same view in a number of cases after the Amending Act came into force in that year (see *J. Ovid v. Seth Chandra Bhan* (6), *Kunji Lal v. Emperor* (7), *Banwari Lal v. Emperor* (8); *Debi Bux Singh v. Rex* (9); *Mahendra Pal Singh v. State of Uttar Pradesh* (10). In *Raju v. Emperor* (11) the Lahore High Court was of opinion that it never had an inherent power to alter or review its judgment in a criminal case except (it would seem) in cases where the judgment was passed without jurisdiction or in default of appearance without an adjudication on the merits. In *in re Soma Naidu* (12) it was held by the Madras High Court that the judgment of a High Court in a criminal matter is final as soon as it is signed and thereafter the Court is *functus officio* and has no power to revise or alter its decision. More recently the Andhra Pradesh High Court in *P. Venkatrayadu v. The State* (13) and the Orissa High Court in *Namdeo Sindhi v. The State* (14) have held that the principle of finality constitutes a bar to the purported exercise by a High Court of its inherent power to review its judgment passed, in the first case, in an appeal, and, in the second, in a revision application.

This Court has however in four reported cases exercised its inherent powers under section 561-A. In *Sri Ram v. Emperor* (15) the appellant Moti Lal had been convicted by a magistrate for a breach of the Hoarding and Profiteering Prevention Ordinance, 1943, and sentenced to eighteen months' rigorous imprisonment and

(1) (1916) I.L.R. 38 All. 134.

(3) (1887) I.L.R. 14 Cal. 42.

(5) (1923) I.L.R. 46 Mad. 382.

(7) A.I.R. 1935 All. 60.

(9) A.I.R. 1950 All. 299.

(11) A.I.R. 1928 Lah. 462.

(13) A.I.R. 1957 Oudh 943.

(15) A.I.R. 1948 All. 106.

(2) (1886) I.L.R. 10 Bom. 176.

(4) (1919) I.L.R. 46 Cal. 60.

(6) A.I.R. 1923 All. 473.

(8) A.I.R. 1935 All. 466.

(10) 1958 A.L.J. 518.

(12) (1924) I.L.R. 47 Mad. 428.

(14) A.I.R. 1958 Orissa 20.

to pay a fine. An application in revision to this Court by Moti Lal was dismissed. The magistrate had tried the accused in the ordinary way, but after the application in revision had been dismissed it was discovered that as a consequence of an amendment of the Ordinance the magistrate had power only to try an offence under the Ordinance in a summary way unless the District Magistrate otherwise directed; and that no such direction had been given in the case of Moti Lal. The trying magistrate had therefore no power to impose a sentence of imprisonment for a term exceeding three months. On an application made to it under section 561-A this Court held that as a mandatory provision of law had been overlooked it had power to correct what it described as an obvious error. The Court said at page 107:

"Section 369 begins with the words 'save as otherwise provided by this Code', and we consider that section 561-A, where this Court is satisfied that it is necessary, to secure the ends of justice, that it should interfere under its inherent powers, it ought to do so. We do not want to encourage successive revisions. Where a revision has been decided, we are not of the opinion that a second revision would lie or that a party has a right to have the matter reheard or reargued, but where, as in this case, a mandatory provision of law has been overlooked, we think this Court has power to correct an obvious error."

In *Chandrika v. Rex* (1) an application was made for the rehearing of an appeal which had been dismissed by this Court. The Court had directed that the appeal be heard on the 5th July, 1948, but by a mistake of the office, it was placed in the list for hearing on the

(1) A.I.R. 1949 All. 176.

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preceding 25th June, and learned counsel, being unaware of this fact, did not appear and the appellant was not heard. The Court accepted the proposition that it had no power to review its judgment passed on appeal, but it took the view that the application before it was neither an application for the review of the Court's earlier judgment nor that that judgment be altered, but was an application that the proceedings before the Court on the 25th June, 1948, be set aside and the appeal reheard; and such an order, it was of opinion, the Court had power to make under section 561-A.

In *Mohammad Wasi v. State* (1) the two accused had been convicted of house trespass and theft and in view of their previous convictions each was sentenced to seven years' rigorous imprisonment. Jail appeals were filed by the two accused which came before AGARWALA, J. who dismissed the appeal of the second accused but admitted that of Mohammad Wasi. The appeal of Mohammad Wasi was later heard by another learned Judge who found that there was no evidence which would justify the application of the provisions of section 75 of the Indian Penal Code. In the result he dismissed the appeal but reduced the sentence to one of four years' rigorous imprisonment and recommended that the record of the case of the second accused be placed again before AGARWALA, J., for further consideration. Upon this being done, AGARWALA, J., came to the conclusion that he had power under section 561-A to modify his previous order dismissing the appeal and he reduced the sentence of Shubrati to four years' rigorous imprisonment. The learned Judge in the course of his judgment said:

"Where a Court discovers that an order has been passed which upon the face of it is erroneous or

(1) A.I.R. 1951 All. 441.



unjust and the defect is of such a glaring nature that it could be said that having regard to the materials on the record the Court had no jurisdiction to pass it or that it failed to exercise a jurisdiction vested in it by law, the Court may, and indeed is bound to, review its own order and modify or set it aside in order to 'secure the ends of justice'".

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In *Ram Dass v. State* (1) the applicant had been sentenced to a term of imprisonment and to pay a fine. He filed an application in revision in this Court, but at the time of doing so he had not surrendered and he was said to be suffering from tuberculosis and was bed-ridden. The Court directed a medical certificate to be filed. When the application came on for hearing on a subsequent date the applicant was not represented. It was not however brought to the notice of the Court that the applicant's counsel was ill or that the requisite medical certificate with regard to the applicant's own illness had been filed pursuant to the Court's earlier order, and this Court dismissed the application. Thereafter an application was filed under section 561-A which came before BIND BASNI PRASAD, J. That learned Judge was of opinion on the authority of *Sri Ram v. Emperor* (2) that where the High Court is satisfied that in order to secure the ends of justice it is necessary that it should interfere under its inherent powers it ought to do so; and that where an order has been passed by the Court under a misapprehension as to the facts the provisions of section 561-A can be applied and the order revised.

In all these cases there is, I think, an assumption, express or implied, that the provision of the Code are subject to section 561-A. That assumption, for reasons

(1) A.I.R. 1952 All. 926.

(2) A.I.R. 1948 All. 106.

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which I have endeavoured to state, I think to be unfounded. In my opinion this Court, as soon as its judgment in a criminal revision case has been signed and sealed, becomes *functus officio* and has no power to revoke, review, recall or alter the order it has already made. I assume of course that that order was made in the exercise of its jurisdiction: if for any reason the Court makes an order without jurisdiction that order or judgment is a nullity and the application in which it was made must be reheard.

I would answer the question referred to us accordingly.

DAYAL, J.:—The question which has been referred to this Bench is:

“Whether this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same? If so, in what circumstances?”

There is no specific provision in the Criminal Procedure Code (hereinafter referred to as the Code) which empowers this Court to review or bars it from reviewing its judgments or orders passed in criminal appeals and revisions. Section 369 applies to judgments delivered by this Court in the exercise of its original jurisdiction. This section is:

“Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court, by the Letters Patent or other instrument constituting such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.”

This section is in Chapter XXVI of the Code which consists of sections 366 to 369. Section 366 deals with the pronouncement of judgment in every trial in any criminal court of original jurisdiction. Section 367 deals with the language of such judgment. Section 368

deals with a particular type of sentence—a sentence to death. Lastly, section 369 provides in general that a court, after it has signed its judgment, shall not alter or review the same except to correct a clerical error. A judgment can be altered or reviewed by a court in certain circumstances mentioned in this section. The section must however, in the context in which it is placed, refer to the alteration or the reviewing of a judgment which is delivered by a criminal court of original jurisdiction in any trial and cannot refer to a judgment delivered by a Court in its appellate or revisional jurisdiction. This matter is made clear by the provisions of section 424 of the Code which is:

“The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate court other than a **High Court**:

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.”

This section makes it clear, if any clarification was needed, that the rules contained in Chapter XXVI of the Code relate to the judgment of a criminal court of original jurisdiction. It also makes it clear that those rules will apply to the judgment of an appellate court other than a High Court. There is nothing in Chapter XXXII of the Code dealing with Reference and Revision which makes the provisions of section 369 of the Code applicable to the orders passed by the courts of revision. Reference may be made to the observation of DAS, J. (as he then was) in the case of *U. J. S. Chopra v. State of Bombay* (1) it is said at page 107:

(1) (1955) 2 S.C.R. 94.

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"In view of the scheme summarised above there can be no manner of doubt that the provisions of the sections collected in Chapter XXVI are concerned with judgments pronounced by the trial court. This conclusion is certainly reinforced by the language of some of these sections."

In *Lala Jairam Das v. King Emperor* (1) it is said at page 344:

"Moreover, in the same event it would result in an alternation by the High Court of its judgment which is prohibited by section 369 of the Code."

The case before their Lordships was one in which the High Court had refused to grant bail to a person whose appeal had been dismissed by it and who had filed an appeal before the Privy Council by special leave. I do not, in the circumstances, take this observation to be a declaration of the law to the effect that section 369 applied to the judgments of this Court in appeal.

The High Court can have a power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same only if such a power can be included within its inherent powers which are saved to it in spite of the various provisions of the Code by section 561-A which is:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

If such a power is so included it can be exercised for the purposes mentioned in that section. It would be a matter for determination by the court in each individual case whether the circumstances of the case make

(1) 1945 A.L.J. 340.

out that purpose and make it incumbent on the court to exercise that power to achieve it. This section does not confer any inherent power on the High Court. It only saves such inherent power which the High Court possessed from before. An inherent power implies by its very nature a power which cannot be expressed in terms but which must reside in a court for achieving the higher and the main purpose of a court, namely the purpose of doing justice in a cause before it and for seeing that the act of the court does not injury to any of the suitors. In *Rodger v. The Comptoir D' Es-compte De Paris* (1) at page 475 Lord Cairns said:

"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

Circumstances requiring the use of such a power cannot be foreseen. The Legislature enacts provisions to meet such circumstances which can be foreseen, and once provision has been made in the statute about a certain circumstance the occasion to invoke inherent power in that circumstance practically vanishes. An occasion to invoke the inherent power will not then arise for the simple reason that when the Code has provided for that contingency, that provided method must

(1) (1871) L.R. 3 P.C. 465.

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be considered to be the just method to meet that contingency and any other method thought of by the court cannot then be said to be a method which would advance the interest of justice. It is in this sense that no occasion for the exercise of any inherent power arises when the statute expressly or by necessary implication provides for what is to be done in that situation.

In *Rajunder Narain Rae v. Bijai Govind Singh* (1), the Judicial Committee of the Privy Council entertained and allowed a petition to have its order for dismissing the appeal and affirming the judgment of the court below recalled and for leave also to prosecute the original petition of appeal. This was in a civil matter; but the observations of their Lordships have a significant bearing on the question of the inherent powers of the High Court—practically the last court of appeal in criminal matters. Lord Brougham said at page 126:

"It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be reheard, and that an order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed the only supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of rehearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in."

(1) 1 Moore 117.

His Lordship said later at page 126 :

“The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgment; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a rehearing upon the whole cause, and an entire alteration of the judgment once pronounced.”

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His Lordship further said at page 130 :

“Their Lordships (of the House of Lords) have carried their discretionary power of alteration no further than to rectify errors of a subordinate kind, and, in very peculiar circumstances, to indulge parties by keeping partial questions open, which the decree had concluded, without their having been any distinct intention of that kind on the part of the House.”

His Lordship also said at page 134 :

“It is impossible to doubt that the indulgence extended in such cases, is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard.”

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The reported judgment prints at page 127 an abstract of the case alluded to by Lord Brougham in delivering his judgment extracted from the records in the Council office. The abstract refers at page 128 to a criminal case thus :

"There is another case, in the books of the Council Office, which has been referred to as an instance of the Council permitting a rehearing; but that was before the order made on the first hearing had been confirmed by the King, and was also, in a criminal matter from *Minorca*, being a petition for the remission of the sentence passed upon conviction of prejury. The Council having, upon the first hearing, remitted the whole sentence, afterwards reheard the case at the instance of the Governor, when a partial remission was substituted. *Re. Martin Fonaris*, 29th July 1719."

It is clear from this case that there remains a certain power, referred to as the discretionary power, in the last court of appeal at least for rehearing of a decided matter in the extraordinary circumstances justifying it and that such a power must naturally be used very sparingly.

In this connection reference may also be made to the case of *The Owners of the Vessel "Singapore"* and the owners of the Vessel "*Hebe*" (L. R., P. C. Vol. I, 378). In that case a petition was presented for a rehearing of an appeal before the report of the Judicial Committee had been confirmed by Her Majesty in Council on the ground that evidence had been received at the hearing of the appeal which was not called for or produced in the court below and which contradicted the case made by the pleadings on both sides. SIR WILLIAM ERLE delivering the judgment of the judicial Committee said at page 388 :



"We do not affirm that there is no competency in this Court to grant a rehearing in any case."

He further said later :

"This, however, is a Supreme Court of final appeal, and it is inconsistent with the purposes for which such a Tribunal was instituted, that in any case, at the option of the parties who are dissatisfied with the conclusion which the Court has arrived at, they should be at liberty to apply for a reconsideration of the judgment upon the point decided thereby. Although it is within the competency of the Court to grant a rehearing, according to the authorities cited above, still it must be a very strong case indeed, and coming within the class of cases there collected, that would induce this Court so to interfere."

In *King Emperor v. Khwaja Nazir Ahmad* (1), their Lordships of the Judicial Committee said at page 213 :

"It has sometimes been thought that section 561-A has given increased powers to the court which it did not possess before that section was enacted. But this is not so. The section gives no new power; it only provided that those which the court already inherently possesses shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act."

In *Lala Jairam Das v. King Emperor* (2), their Lordships of the Judicial Committee said at page 343 :

"If such a power exists in a High Court it can only be as a power inherent in a High Court,

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(1) 1945 A.L.J. 47.

(2) 1945 A.L.J. 340.

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because it is a power which is necessary to secure the ends of Justice."

and again at page 343 :

"Section 561-A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice."

This means that all powers which be necessary to secure the ends of justice existed in the High Court and their existence is recognised by section 561-A of the Code. As mentioned earlier, there can be no list of such powers, and the existence or non-existence of such a power to do a certain thing cannot be dependent on the Court having exercised such a power at an earlier date or not.

In *Talab Haji Hussain v. Madhukar Purshottam Mondkar* (1), it was held that the High Court has inherent power under section 561-A to cancel the bail granted to a person accused of a bailable offence. It was observed at page 378 :

"It is only if the matter in question is not covered by any specific provisions of the Code that section 561-A can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. . . .

In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise; but it is not possible that any legislative enactment dealing with procedure, however carefully it may be drafted would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to

(1) A.I.R. 1958 S.C. 376.

deal with cases where such lacunae are discovered that procedural law invariably recognizes the existence of inherent power in Courts. . . . .

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It would be noticed that it is only the High Courts whose inherent power is recognized by section 561-A and even in regard to the High Court's inherent power definite salutary safeguards have been laid down as to its exercise. It is only where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any Court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent power under section 561-A. There can thus be no dispute about the scope and nature of the inherent power of the High Courts and the extent of its exercise."

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Nothing can be a more clear enunciation of the scope and nature of the inherent power of the High Court. Whenever the High Court is satisfied that for these aforesaid purposes it should exercise its inherent power it is its duty to exercise it and secure completion of those purposes. I do not therefore consider this case in any way to support the contention that the High Court cannot review its previous order in the exercise of its inherent power.

In view of the aforesaid, I am inclined to hold that in the exercise of its inherent powers this Court can review its judgments and orders if it is necessary to exercise them to achieve either of the purposes mentioned in section 561-A, that is, to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no direct declaration to the contrary in any pronouncement of the Privy Council or the Supreme

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Court. This High Court has expressed different views on the point and the other High Courts have generally held against the existence of such a power but have reviewed cases in certain circumstances. I shall therefore now consider the case law on the point.

Prior to the introduction of section 561-A of the Code of Criminal Procedure in 1923 there was no corresponding provision in any of the Criminal Procedure Codes which were in force at the time. The entire case law on the question of the power of the High Court to review its judgments or orders was really based on a very early case *Queen v. Godai Raout* (1). In that case a criminal appeal by a person convicted on jury trial was dismissed by the High Court. Thereafter an application for the review of that judgment on the ground that it was wrong in law was filed. It was held that the High Court could not entertain an application to review a judgment passed by it on appeal in a criminal case. The *ratio decidendi* of this case was that section 38 of the Charter of the High Court ordained:

"that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature in Bengal, in the exercise of its ordinary criminal jurisdiction, and also in all other criminal cases over which the said Supreme Court now has jurisdiction, shall be regulated by the procedure and practice now in use in the said Supreme Court, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General-in-Council, and being Act XXV of 1861, or by such further or other enactments of the Governor-General in relation to Criminal Procedure as are now in force,"

(1) 5 W.R. 61 (Cal.).

and that the Criminal Procedure Code then in force, i.e. Act XXV of 1861, contained no provision for the review of a judgment.

It was also considered relevant that though the Code of Civil Procedure contained a section expressly authorising a review of judgment the Code of Criminal Procedure passed subsequently had contained no corresponding section. This fact led to the inference that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases.

It was further observed at page 64 :

"There would be no end to cases of this kind, if after the Court has duly recorded its judgment, the matter is to be re-opened on the ground that the Court has come to an erroneous conclusion."

The following observation at page 64 makes clear what this decision really covered :

"We do not mean to say that if before a judgment has been recorded the attention of the Court be called to any matter showing that there is an error or mistake in the judgment pronounced the Court has not the power of correcting such error or mistake. Nor do we mean that the Court has no power to correct clerical errors in its judgments after they are recorded. But we are speaking of cases where the judgment has been recorded, and the Court is called upon to grant a review of its judgment for the purpose of showing that it ought to have come to a different conclusion either upon the facts or upon the law."

The following observations on page 63 show that there had been cases in which judgments had been reviewed :

"There were certainly one or two cases cited in which the Nizamut Adawlut did grant a

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of the Court to which no specific reference was made in the Criminal Procedure Codes.

In the Appellate Side Proceedings, dated the 7th November, 1873 (VII Madras High Court Reports page xxix) it was held:

"When a criminal appeal has been rejected without hearing the appellant's pleader, and it is afterwards proved to the satisfaction of the Appellate Court that an adequate excuse has been made for the pleader's non-appearance, it is open to the Appellate Court to rehear the appeal on its merits."

In this case the appeal was rejected by the Acting District Magistrate. The order was passed because section 278 of the Code of Criminal Procedure of 1872 required the appellate court to give a reasonable time for the appearance of the appellant or his counsel or authorised agent, and if one of them appeared, to hear him before rejecting the appeal. Such an order can be justified only on the ground of the Court's exercising its inherent power when the interest of justice demanded it and it became necessary in this case because the Court ignored the mandatory provisions of section 278 of the Criminal Procedure Code. It is to be noticed that the appeal was to be reheard by the Acting District Magistrate and not the High Court.

This case was approved in *B. Runga Rao, In re.* (1) wherein it was said:

"We have no doubt that this is correct, for the language of section 421 requires a reasonable opportunity to be given and if such reasonable opportunity is not given the Court has no jurisdiction to dismiss the appeal."

(1) 23 M.L.J. 371.

I do not think, with respect, that any question of jurisdiction arose in the circumstances. The Court had jurisdiction to dismiss the appeal. The contention that the Court had an inherent power to rehear a petition once dismissed was raised in this case and was repelled by the observation.

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"We asked Mr. Srinivasa Aiyangar to produce any authority to show that such a power to review or alter its judgment has ever been exercised by the High Court in England and he has been unable to do so. The proposition is accepted both in Halsbury's Laws of England and in Archbold's Criminal Practice that where a judgment is once complete the High Court has no power to alter it."

I am not aware of any provision of the Criminal Procedure Code which allows a criminal appeal rejected summarily without hearing counsel to be restored.

In *Queen-Empress v. Lalit Tiwari* (1) a revision decided on merits was reheard on the ground that the judgment pronounced and signed by the High Court had not been sealed. This case was followed by the Calcutta High Court in *Amodini Dasee v. Darsan Ghose* (2) and by the Patna High Court in *Mohan Singh v. Emperor* (3). No provision of the Criminal Procedure Code required the judgment to be sealed. It was required to be sealed under the rules of the Court. In *Emperor v. Pragmadho Singh* (4) it was held that a judgment pronounced by a Judge of the High Court is a good judgment and does not require for its validity that it be signed by the Judge or should bear the seal of the Court.

In *Bibhuti Mohun Roy v. Dasi Money Dasi* (5) the rehearing of a revision dismissed for default was not

(1) (1899) I.L.R. 21 All. 177.

(2) (1911) I.L.R. 38 Cal. 828.

(3) A.I.R. 1944 Pat. 209.

(4) (1933) I.L.R. 55 All. 132.

(5) 10 C.L.J. 80.

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considered justified on the ground that the original order had not been sealed. But the rehearing was considered justified on the following ground, in spite of the Court's acknowledging the correctness of the view expressed in the cases of.

In the *matter of Gibbons* (1) and *Queen-Empress v. C. P. Fox* (2) :

"We are however unable to find in this country any authority for the proposition that there is no jurisdiction to hear and determine a criminal case which has not been heard and determined on the merits. The two cases to which we have referred were heard and determined and the Court had given a judgment in each. On this ground these cases are distinguishable from the present case which has not been heard and determined and in which no judgment has been given. The English cases dealing with the practice as regards Rules and motions are to the effect that the Court will not reopen a rule when it has been disposed of after hearing. See *Phillips v. Weyman* (3); but notwithstanding that rule there is one case at least in which a rule discharged under a misapprehension of fact was allowed to be reopened on a fresh motion; see *Cooper v. Fogger* (4).

These and the two cases to which we have last referred lead us to the view that the proposition that there is no inherent power of the Court to reopen a rule, which has not been disposed of on a consideration of the grounds of the rule, cannot be sustained, and we have been able to find no case decided either in this country or in England which lays down the proposition that the Court is precluded from hearing, determining and giving

(1) (1887) I.L.R. 14 Cal. 42.  
(3) 2 Chitty 265.

(2) (1886) I.L.R. 10 Bom. 176.  
(4) 1 Chitty 44.



a judgment in a case merely because it has made an order disposing of it in default of appearance."

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The Court, I may say with respect, must have based its view on the existence of inherent power to which I may repeat no reference had been made in the Criminal Procedure Code of 1898.

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The views of the various High Courts are divided on the question of rehearing a revision dismissed for default. The Madras High Court in *B. Runga Rao, In re.* (1) held that it had no power to review its order dismissing a revision for default. The Lahore High Court in *Kishen Singh v. Girdhari Lal* (2) followed the Calcutta view and so did the Patna High Court in *Ramautar Thakur v. State of Bihar* (3) holding that an order dismissing a revision in default was not a judgment and therefore section 369, Criminal Procedure Code, did not bar the rehearing of a revision so disposed of. They also justified the order on the ground that it was necessary to secure the ends of justice. The Orissa High Court however in *Namdeo Sindhi v. The State* (4) held that criminal revision dismissed summarily could not be reheard on the principle of finality in view of the observations of their Lordships of the Supreme Court in *U. J. S. Chopra v. State of Bombay* (5).

In *King-Emperor v. Romesh Chandra Gupta* (6) a reference was decided on merits and it was reheard as no notice had been issued to the accused whose sentence had been enhanced. The judgment in the case does not mention on what provision of law the rehearing was held justified.

In *Tadi Soma Naidu, In re.* (7) the Court considered an order in revision enhancing the sentence of the

(1) 23 M.L.J. 371.

(3) A.I.R. 1957 Pat. 33.

(5) (1955) 2 S.C.R. 94.

(2) A.I.R. 1924 Lah. 310.

(4) A.I.R. 1928 Orissa 20.

(6) 22 C.W.N. 168.

(7) (1924) I.L.R. 47 Mad. 428.

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accused to be null and void as no opportunity had been afforded to the accused to show cause against the enhancement of the sentence and reheard the matter.

In *Rajjab Ali v. Emperor* (1) an order dismissing an appeal summarily was not reviewed with respect to the quantum of sentence even though the sentences of the other co-accused had been reduced in appeals subsequently preferred and decided. The position in the Calcutta High Court with respect to the reviewing of orders in criminal cases was summed up thus:

"The result of the decisions of this Court subsequent to the Full Bench case seems to be this : that where a case is disposed of merely for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertence no opportunity has been given to him to be heard in his defence such an order is not one to which the ruling in the Full Bench case applies."

In *Kunhammad Haji, In re.* (2) a jail appeal was summarily rejected as time-barred. Later an appeal was filed through counsel. The rehearing was not allowed. In connection with the inherent power of the Court to review its previous order it was said at page 390:

"For a fact conclusive in the nature of the case against the existence of an inherent power, no instance of its exercise has been produced and it is negatived in the case last referred to *Rajjab Ali v. Emperor* (1) and *Anonymous* (3) and in the matter of *Gibbons* (4), *Queen Empress v. Durga Charan* (5), *Queen Empress v. C. P. Fox* (6) and *In re. Ranga Rao* (7). The accused's claim must therefore fail if it is regarded as to a review."

(1) (1919) I.L.R. 46 Cal. 60.

(3) 7 M.H.C.R. app. 29.

(5) (1885) I.L.R. 7 All. 672.

(7) 23 M.L.J. 371.

(2) (1923) I.L.R. 46 Mad. 382.

(4) (1887) I.L.R. 14 Cal. 42.

(6) (1886) I.L.R. 10 Bom. 176.

In *Kale v. King-Emperor* (1), STUART, J. observed at page 474:

"This is not a matter which I can possibly take up in revision. Even if I myself had passed the order dismissing the appeal I could not revise it and I certainly cannot revise the order of another Judge of this Court. There can be no revision in the matter."

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This was consistent with the view then prevailing before the amendment of the Criminal Procedure Code in 1923.

It appears from the above that before the Criminal Procedure Code was amended in 1923, the High Courts reviewed their orders dismissing revisions on merits or otherwise or rejecting appeals summarily when some statutory provision of law had been ignored and justified it on the ground that orders passed in such circumstances were null and void, having been passed without jurisdiction. It was only in a few cases that it was contended that the Court could review its judgment and order passed on merits in the exercise of its inherent powers and the contention was repelled as no case in which the Court exercised its inherent power had been brought to the notice of the Court.

In 1923 section 361-A found a place in the Criminal Procedure Code and thereafter the Courts used their inherent power in certain cases.

In *Muhammad Sadiq v. The Crown* (2) an appeal had been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in accordance with the proviso to section 421(1) of the Criminal Procedure Code. The Court held on the

(1) A.I.R. 1923 All. 473.

(2) A.I.R. 1925 Lah. 355.

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basis of the earlier cases that the order had been passed without jurisdiction and then observed at page 365:

"Without holding that the Court under section 561-A, Criminal Procedure Code, has inherent power to review its own order, we think that this is certainly a case where the Court has inherent power to make an order that the appeal of Muhammad Sadiq, son of Muhammad Yusaf, should be reheard after giving him or his counsel a reasonable opportunity of being heard in support of the same, and we order accordingly."

The rehearing was justified on the existence of the inherent power and the Court left it open whether under section 561-A it had inherent power to review its own order.

In *Mathra Das v. The Crown* (1) a revision decided on merits was reheard in the exercise of inherent power in view of section 561-A. This case was not approved in *Raju v. Emperor* (2) where a revision rejected presumably after hearing was sought to be reviewed in view of another Bench taking a different view about the sentences on the other co-accused. The Bench held that section 369 of the Criminal Procedure Code did not affect the inherent power of the Court and that the High Court never had an inherent power to alter or review its own judgment except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on merits.

In *Ramesh Pada Mandal v. Kadambini Das* (3) a reference was decided on merits. The judgment was reviewed as the accused had not been heard. It was said at page 703:

"But be that as it may, we are concerned really, on the question of jurisdiction, with the provi-

(1) A.I.R. 1927 Lah. 139.  
(3) A.I.R. 1927 Cal. 702.

(2) A.I.R. 1928 Lah. 462.

sions such as are contained in the Criminal Procedure Code, as at present amended. We think under the present Code we have ample powers in a case of this description and having regard to the facts involved to vacate our order of the 5th May, 1927, and to rehear the reference."

Similar view was expressed in *Emperor v. Shiva Datta* (1).

In *Dahu Raut v. Emperor* (2) the Court held against the existence of inherent power to review an order passed by it an appeal or revision.

In *Sripat Narain Singh v. Gahbar Rai* (3), ASHWORTH, J. said at page 726 in connection with an attempt to review an order in a revision passed without hearing counsel:

"I am not prepared to say that a Judge of this Court cannot review his judgment or decision. But it appears to me very clear that the application for review must come before the Judge who passed the decision which is to be reviewed . . . . But the case once having been decided the mere fact that I did not exercise a discretion to hear counsel is no ground for a review."

In *Kunji Lal v. Emperor* (4), BENNET, J. in considering an application asking for review of an order dismissing an application in revision which had been signed and sealed dealt with the question of the maintainability of such an application under section 561-A of the Criminal Procedure Code. He held that the Court could not review its earlier order. He said at page 61:

"It is to be noted that in section 369 there is no reference to review being allowed by section 561-A

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(1) A.I.R. 1928 Oudh 402.  
(3) A.I.R. 1927 All. 724.

(2) (1934) I.L.R. 61 Cal. 153.  
... (4) A.I.R. 1935 All. 60.

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. . Learned counsel however argued that section 561-A could also come under these words 'Save as otherwise provided by this Code,' but in section 561-A there is no definite provision for a review of judgment. I am of opinion that review is a definite method of procedure and that if the Legislature intended by the Amending Act (Act 18 of 1923), to make a provision in the Code for a review there would have been a definite section dealing with a right of review and laying down the conditions under which that could be exercised."

The omission of a particular provision in the Code for a review can only mean that the Legislature did not wish to give a general right to an aggrieved person to ask the Court to review its earlier order. The absence of such a provision does not mean that the Court cannot review its earlier order in the exercise of its inherent powers.

In *Banwari Lal v. Emperor* (1), KENDALL and BAJPAI, JJ. confirmed this view of BENNET, J. Three applications for revision received from jail were disposed of on merits by this Court. A counsel thereafter filed fresh applications in revision. The question arose whether the learned Judge had jurisdiction to review his own orders. It was said at page 467 :

"It follows therefore that when the section was amended in 1923 in such a way as to show that the High Court had no power of altering or reviewing a judgment, except to correct a clerical error, the Legislature did not attempt or intend to deprive the High Court of any inherent power which it had hitherto possessed. This point is of importance when we consider the application of section 561-A which was also introduced into the Code in 1923. That section does not in terms invest the Court with any powers which it did not

(1) A.I.R. 1935 All. 466.

possess before. But it does refer to an inherent power of which the High Court is already in possession. We have given above the authority for holding that the High Court possessed no inherent power to review its judgment before the amendments of 1923. Consequently it cannot be said that section 561-A either modifies the provisions of section 369 or clothes the Court with any fresh power."

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I have already stated in connection with the earlier cases that they except a few did not consider whether the High Court had inherent power to review its orders. They simply considered that the Criminal Procedure Code contained no provision empowering the High Court to review its orders and that the procedure of the High Court was to be regulated by the provisions of the Criminal Code in view of the language of the Charter or the Letters Patent.

This view was modified in 1948 in the case of *Sri Ram v. Emperor* (1). In this case the mandatory provision of law contained in the amended section 14-A, Hoarding and Profiteering Prevention Ordinance, 1943, had been overlooked in a trial in respect of an offence under the Ordinance and was not brought to the notice of the Court dismissing the revision. The accused subsequently applied for the review of the order. In repelling the contention advanced by the learned Government Advocate that this Court had no power to review and could not alter its judgment except to correct a clerical error it was said at page 107:

"We are not prepared to accept his submission. Section 369 begins with the words 'Save as otherwise provided by this Code,' and we consider that under section 561-A, where this Court is satisfied

(1) A.I.R. 1948 All. 106

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that it is necessary, to secure the ends of justice, that it should interfere under its inherent powers, it ought to do so."

It was pointed out that there was no right in a party to have a matter reheard or re-argued, and it was said:

"Where a revision has been decided, we are not of the opinion that a second revision would lie or that a party has a right to have the matter reheard or re-argued, but where, as in this case, a mandatory provision of law has been overlooked, we think this Court has power to correct an obvious error."

It seems to me to amount to a denial of justice if an order of the Court admittedly against law be allowed to stand and be not corrected even when the Court had inherent power to pass any order to secure the ends of justice and when such power has been specifically recognized by section 561-A, Criminal Procedure Code expressing in clear terms that nothing in the Code affects such inherent power and when there is no specific provision in the Code that such orders cannot be reviewed. Section 369, as already stated, does not apply to judgments and orders in appeal or revision and even if it does section 561-A can be taken to be a particular provision which saves the power of review by the High Court in such cases where it has to be exercised for the purposes mentioned in that section.

In *Chandrika v. Rex* (1) an appeal happened to be decided on a date earlier than the date for which the hearing was fixed on the application of the appellant. The appellant then applied for rehearing of the appeal. SETH, J. said at page 176:

"There cannot be the least doubt that these facts constitute a sufficient cause for setting aside the proceedings, starting with the hearing of the appeal and terminating with judgment, inasmuch

(1) A.I.R. 1949 All. 176.



as by a mistake on the part of some clerks of this Court great injustice has been done to the appellant, as he was deprived of an opportunity of being heard. The hearing of the appeal, under the circumstances indicated above, amounted to an abuse of the process of the Court, although it was not deliberate and only inadvertent."

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He repelled the contention for the State that the Court had no jurisdiction to grant a rehearing in view of the provision of section 430, Criminal Procedure Code thus:

"The expression 'judgment shall be final' or expressions to the similar effect are also to be found in statutes other than the Criminal Procedure Code and they have come up for interpretation before this Court in several cases. It has been consistently held by this Court that all that such expressions mean, is that the judgment shall not be open to any further appeal and that the powers of High Court to interfere with it otherwise than in appeal are not taken away."

I, with respect, agree with these observations.

In *Debi Bux Singh v. Rex* (1) a revision was decided on merits in the absence of the applicant's counsel. An application was then presented for the restoration of the revision application. HARISH CHANDRA, J. rejected this application saying:

"The revision application was rejected by me on the merits after looking carefully through the judgment of the learned Sessions Judge. In the circumstances, my view is that this Court has no power to set aside that order acting under section 561-A, Criminal Procedure Code, and to direct that the application be re-heard."

He did not express any opinion about the Court having no inherent power to review its earlier orders in

(1) A.I.R. 1950 All. 299.

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certain circumstances when the interest of justice demanded it. This case does not therefore question the correctness of the 1948 bench decision *Sri Ram v. Emperor* (1).

In *Mohammad Wasi v. State* (2) jail appeals were preferred by Mohammad Wasi and Shubrati against their conviction under sections 451 and 380 read with section 75, Indian Penal Code. Shubrati's appeal was dismissed and Mohammad Wasi's appeal was admitted. Mohammad Wasi's appeal came up for hearing before a learned Judge who found that there was no evidence on the record to bring section 75, Indian Penal Code into operation and accordingly his sentence of seven years' rigorous imprisonment was reduced to four years. The learned Judge recommended that the record be put up before Hon'ble AGARWALA, J. who had dismissed the appeal of Shubrati for its examination. AGARWALA, J. examined the case of Shubrati and came to the conclusion that there was no evidence to bring the case under section 75, Indian Penal Code. In these circumstances he reviewed his previous order observing:

"I think I have power to do so under the provisions of section 561-A. This is a case in which upon the record, as it stands, the accused could not be punished with reference to section 75, Indian Penal Code at all. Where a Court discovers that an order has been passed which upon the face of the record is erroneous and unjust, and the defect is of such a glaring nature that it could be said that having regard to the materials on the record, the Court had no jurisdiction to pass it or that it failed to exercise a jurisdiction vested in it by law, the Court may, and, indeed is bound to, review its own order and modify or set it aside, in order to 'secure the ends of justice'."

(1) A.I.R. 1948 All. 106.

(2) A.I.R. 1951 All. 441.

I do not, with respect, agree with the view that the Court had no jurisdiction to pass the earlier order or that it failed to exercise a jurisdiction vested in it by law. The ends of justice however required that the previous order be reviewed.

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In *Ram Das v. State* (1), BIND BASNI PRASAD, J. followed the case of *Sri Ram v. Emperor* (2) and ordered the rehearing of a revision which had been dismissed for the default of the applicant, the Court being not aware of the submission of an illness slip of the applicant's counsel and of the applicant's filing a medical certificate as required by the Court. BIND BASNI PRASAD, J. ordered the rehearing of the revision as the earlier order had been passed on a misapprehension of facts.

In *Jagannath Singh v. Bideshi* (3), JAMES, J. said at page 712 :

"After a careful examination of these rulings and also of the decisions mentioned at page 2183 of B. B. Mitra's Code of Criminal Procedure (12th Edn.) my view is that in normal circumstances the High Court has no power to review its previous decision in a criminal case but that where a mandatory provision of law has been contravened resulting in abuse of the process of the Court it is entitled to correct an obvious error."

This, again, is not at variance with what was held in the case of *Sri Ram v. Emperor* (2).

In *Mahendra Pal Singh v. State of Uttar Pradesh* (4) a revision application was rejected after hearing the applicants' counsel at some length. The applicants applied for a review of that order on the ground that at the time when the application in revision was argued the learned counsel who argued it inadvertently omitted

(1) A.I.R. 1952 All. 926.  
(3) A.I.R. 1955 All. 712.

(2) A.I.R. 1948 All. 106.  
(4) 1958 A.L.J. 518.

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to urge certain points of law which arose in the case Sand which deserved the consideration of the Court SRIVASTAVA, J. said at page 519:

"Even apart from the provisions of section 369, Criminal Procedure Code there appears to be high authority for the view that the finality attaches to orders passed by a High Court in appeals and criminal revisions once they are decided, it is not open to the same High Court to alter or review the same. Any one feeling aggrieved by the orders can seek his remedy before the Supreme Court alone."

He referred to certain observations of the Supreme Court in *U. J. S. Chopra v. The State of Bombay* (1) and said at page 520:

"It is true that these observations were in the nature of *obiter dicta*, because the real question which their Lordships were considering in that case was whether an appellant whose appeal had been dismissed summarily could insist on his case being heard on merits once again under sub-section (6) of section 439 Criminal Procedure Code if the State filed an application for enhancement of sentence. But even the *obiter dicta* of their Lordships of the Supreme Court is entitled to the highest respect and is binding on all the Courts of the country."

He then referred to certain earlier cases of this Court and to the case of *Namdeo Sindhi v. State* (2) as holding that the Court possessed no power of view. He also referred to the cases of *Sri Ram v. Emperor* (3) and *The State of Uttar Pradesh v. Bati* (4) and, without going into the question of their being affected by the pronouncement of their Lordships of the Supreme Court

(1) (1955) 2 S.C.R. 94.

(3) A.I.R. 1948 All. 100.

(2) A.I.R. 1958 Orissa 20.

(4) A.I.R. 1950 All. 625.

in *U. J. S. Chopra v. The State of Bombay* (1) and conceding for the moment that the ratio of these decisions was correct, said:

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"... they cannot obviously be of any help to the applicants because in the present case their learned counsel has not been able to bring to my notice any obvious error or mistake in the order by which the applicants' application in revision was dismissed."

This is the first case after 1948 which, on the basis of Chopra's case, throws doubt on the correctness of the view expressed in *Sri Ram's* case (2).

I shall now refer to the Supreme Court cases which have been referred to at the bar in connection with the point under determination. The first case is that of *U. J. S. Chopra v. State of Bombay* (1).

The point for decision before the Supreme Court was whether the convicted person had a right to challenge the correctness of his conviction when a notice for enhancement was issued to him on an application by the State filed subsequent to the summary dismissal of his appeal. The Court had not to consider and the judgments express no views with respect to the power of the High Court to review or recall its earlier order in an appeal or revision when such a review or recall be considered necessary for any of the purposes justifying the exercise of inherent power according to the provisions of section 561-A, Criminal Procedure Code. I therefore do not consider that the judgments in this case can be taken to declare law with respect to the content and the exercise of the inherent power of the High Court which is preserved by section 561-A. Certain observations have been made in the course of the judgments with respect to the competence of the

(1) (1955) 2 S.C.R. 91.

(2) A.I.R. 1948 All. 106.

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High Court to revise or recall the orders passed; but these observations are to be taken in the context of the point for determination and the points urged for consideration before the Supreme Court. I do not consider these observations to refer to the inherent power of the High Court to pass suitable orders to secure the ends of justice even if those orders amount to the reviewing or recalling of an earlier order.

The next Supreme Court case is *Khushi Ram v. Hashim* (1). It was said in the course of the judgment:

"It is unnecessary to emphasise that the inherent power of the High Court under section 561-A cannot be invoked in regard to matters which are directly covered by the specific provisions of the Code; and the matter with which the learned Judge was concerned in the present proceedings is directly covered by section 215. Therefore, in our opinion the learned Judge was clearly in error in allowing his inherent power to be invoked under section 561-A and in setting aside the order of commitment."

This case does not help in the determination of the question before us.

Lastly I may refer to the effect of the general principle of finality on the exercise of the inherent power for reviewing the earlier order. The orders which are made final under the statute are final only *vis-a-vis* the right of a party to appeal; that is to say, such orders are not open to appeal. Such orders of the subordinate courts can be revised by this Court in revision; and such orders of this Court can be reviewed in the exercise of inherent powers which are undoubtedly to be exercised in very exceptional circumstances when there be no doubt that interference with such orders would promote the ends of justice. The general principle of

(1) Criminal Appeal no. 154 of 1957.

finality also operates in the same way. It bars a party to reopen the matter by way of appeal. A specific provision like that of section 561-A must prevail over the general provision of statute law or of natural justice. The law about the exercise of inherent power of the Court in this light must be looked at as a special law, for special circumstances, and therefore overrides any general law, be it of the finality of judgments or any other. I further think that the application of the general principle of finality of a judgment or order of this Court is itself based on the inherent power of the Court to make orders which secure the ends of justice and; therefore cannot be taken to bar the Court from rehearing the matter already decided if that course is considered justified to secure the ends of justice.

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My answer to the question referred is, therefore, that the Court has an inherent power to revoke, review, recall or alter its own earlier decision in a criminal revision and to rehear the same; that naturally the circumstances in which this power can be exercised would be exceptional and would be the circumstances which lead the Court to the view that the exercise of that power is necessary to give effect to any order under the Code or to prevent the abuse of the process of any Court or otherwise to secure the ends of justice, and that it is not possible to enumerate such circumstances.

CHATURVEDI, J.:—This reference to a Full Bench arises out of a criminal revision filed by ten applicants in this Court. The revision was admitted, notice was issued to the State and the applicants were directed to be released on bail. Before it came up for final hearing, the learned counsel for the applicants filed an application under the rules of this Court for adjournment of his cases from the 19th May to the 7th July, 1958, on

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the ground that the adjournment of the cases was required in the interests of the health of the learned counsel. He included this revision also in the application. The learned counsel then left for the hills.

The revision was put up for hearing on the 9th June, 1958. Another counsel made a request, on behalf of the learned counsel for the applicants, that the case be adjourned and the Court adjourned the hearing of the case for three days. It was again listed on the 12th June, 1958, but nobody appeared on that date and the revision was heard and decided on merits without hearing the applicants or their counsel. On his return from the hills the learned counsel for the applicants filed an application, out of which this reference arises, for a rehearing of the revision. The learned single Judge, who had decided the revision, considered a number of authorities on the point whether he could allow the application for rehearing. In the end he was of the opinion that the question was one in which there were a number of authoritative pronouncements. The case was, therefore, ordered to be laid before the Hon'ble Chief Justice for the constitution of a Bench for deciding the questions mentioned by the learned single Judge and the revision came up before a Division Bench of this Court. The Division Bench found that there were conflicting decisions of the Division Benches on the points referred to by the learned single Judge and ordered that the papers be laid before the Hon'ble Chief Justice for constituting a larger Bench. The case then came up before us for expressing our opinions on the points mentioned by the learned single Judge.

The points are—

“(1) Whether this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same ?



(2) If so, in what circumstances?"

I propose to express my opinion on the first point but as regards the second only so far as it is necessary to do so having regard to the facts of the case before me. The circumstances in which the Court may have power to review or alter its earlier decision may be numerous and I do not consider it possible to enumerate all those circumstances. The decisions of the Courts on the above points are many and I propose to consider only the more important of the decisions.

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Reference may be made at the very outset to two sections of the Code of Criminal Procedure, namely, sections 369 and 561-A. Section 369 is the section relied upon by the learned counsel appearing for the State and section 561-A has been relied upon by the learned counsel for the applicants. Section 369 is as follows:

"Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court by the Letters Patent or other instrument constituting such High Court, no court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

The above section has undergone changes from time to time. In the Criminal Procedure Code of 1882, the section was worded as follows:

"No court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in section 395 or to correct a clerical error."

In the present Criminal Procedure Code of 1898 the only alteration made in the section, as it originally stood, was that section 484 of the Criminal Procedure Code was added after section 395. In 1923 the section underwent a substantial change and it now

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stands as already quoted above. The important changes made by the Criminal Procedure Code (Amendment) Act of 1923 are that the High Court is no longer exempted from the operation of the section and this inclusion of the High Courts appears to have led to the further amendments by the introduction of a saving clause in the beginning and of another saving clause governing the High Courts alone. The result of these clauses is that the section has been made subject to the other provisions of the Code of Criminal Procedure and also to the provisions of any other law for the time being in force and, in the case of High Courts established by Royal Charter, further subject to the provisions of the Letters Patent of such High Court. The same Amendment Act, which made the above changes in section 369 of the Code of Criminal Procedure, added section 561-A in the Code in the following words:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse or the process of any Court or otherwise to secure the ends of justice."

The section thus clearly recognises the inherent power of the High Court to make orders as may be deemed by it to be necessary for purposes of—

(1) giving effect to any order under the Code of Criminal Procedure,

(2) for preventing abuse of the process of any Court, and

(3) for otherwise securing the ends of justice.

It declares that the inherent power of the High Courts in the above three matters would prevail as against any other provision that may be found in the Code of Criminal Procedure. So far as the wordings of sections 369 and 561-A, as amended by Criminal Procedure Code (Amendment) Act of 1923, are concerned the position

appears to be that the High Courts have got inherent powers to pass necessary orders in respect of the three matters mentioned in section 561-A in spite of any provision of section 369 of the Code of Criminal Procedure which may be considered to lead to a contrary conclusion.

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Section 151 of the Code of Civil Procedure gives statutory recognition to the inherent powers of every court to make such order as may be necessary in the ends of justice or to prevent abuse of the process of any court. The civil courts have exercised powers of numerous kinds under their inherent jurisdiction, e.g. remanding the case to the trial court, passing order of restitution to original position in cases which do not fall under section 144 of the Code of Civil Procedure, setting aside *ex parte* orders in execution proceedings and so forth. It is also well settled that section 151 of the Code of Civil Procedure confers no additional powers on the civil courts, but only recognises the existence of inherent power of the court to make orders as might be deemed necessary for securing ends of justice and preventing abuse of the process of court. The same is the position with respect to section 561-A of the Code of Criminal Procedure.

The Privy Council has held in the cases of *King Emperor v. Khwaja Nazir Ahmad* (1) and *Jai Ram Das v. King Emperor*, (2) that section 561-A, Criminal Procedure Code, confers no powers on the High Courts. It merely safeguards all existing inherent powers possessed by the High Courts for purposes enumerated in the section. Section 151, Civil Procedure Code, and section 561-A, Criminal Procedure Code, thus merely safeguard the existing inherent powers. Section 151, Civil Procedure Code, safeguards inherent powers of all civil courts, but section 561-A, Criminal Procedure Code, safeguards inherent powers only of the High Court. As far as criminal cases are concerned, section

(1) 1945 A.L.J. 47.

(2) 1945 A.L.J. 340.

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369 has the effect of revoking any such inherent power which may have existed in criminal courts and specifically prohibits the criminal courts from altering or reviewing their judgments, after once the judgments have been signed. The combined effect of sections 369 and 561-A, Criminal Procedure Code, appears to be that no court exercising criminal jurisdiction can alter or review its judgment after it has been signed. The saving clause in the beginning of the section makes an exception in cases where the other provisions of the Code of Criminal Procedure provide to the contrary. One of these other provisions clearly is section 561-A and it safeguards the inherent power only of the High Court. No subordinate criminal court can review or alter its judgment except to correct a clerical error, but the inherent powers of the High Court in the three matters, enumerated in section 561-A, have been preserved by that section.

I consequently think that the High Court has power, amongst other matters, to alter or review its own judgment also, provided it is necessary to do so to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any court or to secure the ends of justice. In Criminal cases, section 561-A recognizes the inherent power of the High Court to alter or review the orders or judgments of the subordinate courts as well. This power has been exercised for quashing proceedings in criminal courts instituted only for purposes of harassing the accused persons and also for expunging remarks improperly made in the judgment or order of a subordinate court.

Section 369, Criminal Procedure Code, came up for consideration before their Lordships of the Supreme Court in the case of *U. J. S. Chopra v. State of Bombay* (1). The point that arose for decision in that case

(1) (1955) 2 S.C.R. 94.

was very different. The court was called upon to decide whether the accused person had a right to urge before the High Court under section 439 (6) of the Code of Criminal Procedure that his conviction was not justified on the evidence on the record, after the appeal filed by him had been summarily dismissed. After the summary dismissal of his appeal, an application was made on behalf of the State for the enhancement of the sentence passed upon the accused, and the contention of the learned counsel for the accused was that he had a right to show to the court that his conviction was not justified on the evidence. The majority judgment of the Bench was delivered by Mr. Justice Bhagwati and, according to this judgment, the accused could show cause against his conviction under section 439(6), Criminal Procedure Code, if his appeal or revision had been dismissed in limine, but he could not show cause against his conviction if his appeal or revision had been dismissed after hearing both the parties. Hon'ble Mr. Justice S. R. Das (as he then was) made observations in his judgment to the effect that section 369, Criminal Procedure Code, imposed a bar only on the trial court prohibiting it from altering or reviewing its order, but it did not impose any bar on the court of appeal or revision. He then observed:

"In any case, section 369 is subject to the other provisions of the Code and I see no reason why section 439(6) should not be regarded as one of such other provisions."

The learned Judge later on said:

"If section 369 were susceptible of as wide a meaning as is read into it, namely, that it applies to all judgments of all courts, original, appellate or revisional, I would, in that case hold that that meaning must be taken as cut down, by reason of the words 'subject to the other provisions of the Code etc.' by the mandatory provisions of section

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439(6). In other words, section 439(6) must be read as controlling section 369 rather than the other way about."

He then held that section 369 was further subject to the provisions of section 430. The other two learned Judges did not say that section 369 applied only to the judgments of the trial court, but based their decision mainly on the ground that an order dismissing an appeal or a revision in limini is not a judgment. Section 369 prohibits review or alteration of a 'judgment' only and, as an order of summary dismissal of an appeal or a revision was held not to be a judgment, the necessary consequence was that section 369 would not be attracted to such a dismissal. The learned Judges further remarked—

"Section 369 in terms provides 'save as otherwise provided in this Code and section 439(6) would be an otherwise provision which is saved by this *non obstante* clause appearing in section 369. It is significant to note that both these amendments, the one in section 369 and the other in section 439 were enacted by section 119 of Act XVIII of 1923 and the very purpose of these simultaneous amendments would appear to be to effectuate the right given to the accused to show cause against his conviction as enacted in section 439(6) of the Code of Criminal Procedure."

Following the above decision it must be held that section 369 applies only to "judgments" passed by criminal courts and, the *non obstante* clause appearing in section 369, makes the section inapplicable where there is express provision to the contrary in the Code of Criminal Procedure, particularly where that provision came into existence by the very Act which added *non obstante* clause in section 369.

In the case of *Talb Haji Hussain v. Madhokar Purshottam Mondkar* (1), the provisions of section 561-A came up for consideration before the Supreme Court. The Supreme Court in that case held that even where the accused was being prosecuted for the commission of a bailable offence, he forfeits his right to be released on bail and an order cancelling his bail can, in appropriate cases, be passed by the High Court under section 561-A. After a consideration of the relevant provisions of law and the important cases, their Lordships observed:

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"We must accordingly hold that the view taken by the Bombay High Court about its inherent power to act in this case under section 561-A is right and must be confirmed. It is hardly necessary to add that the inherent power conferred on High Courts under section 561-A has to be exercised sparingly carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. After all, procedure, whether criminal or civil, must serve the higher purpose of justice; and it is only when the ends of justice are put in jeopardy by the conduct of the accused that the inherent power can and should be exercised in cases like the present."

The above is an authoritative pronouncement of the general powers of the High Court under section 561-A of the Code of Criminal Procedure.

It has already been stated above that section 369, as it stood before its amendment in 1923, exempted the High Courts from its operation. But even under that section it was the view of this court that the High Court had no power to review its own order dismissing an application in revision made by an accused person. See—*Queen Empress v. Durga Charan* (2), *Emperor v. Govind Sahai* (3).

(1) A.I.R. 1958 S.C. 376.

(2) (1885) I.L.R. 7 All. 672.

(3) (1916) I.L.R. 38 All. 134.

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Reference to other cases on the legal position, as it stood before the amendment of 1923, need not be made and I now come to the cases of this Court dealing with section 369 after its amendment in 1923 and the introduction of section 561-A of the Code of Criminal Procedure.

In the case of *Kunji Lal v. Emperor* (1), a learned Judge of this Court has held that there is no definite provision for review of a judgment under section 561-A and, as review was a definite method of procedure, section 561-A does not authorize review of a judgment by the High Court. He further says that there never was any inherent power in the High Court to alter or review its own judgment in a criminal case, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on merits. This case, therefore, does not lay down that there is no inherent power in the High Court to alter or review its judgment where the judgment was delivered in default of appearance of the accused and without adjudicating on the merits of the case.

A Division Bench of this Court in the case of *Banwari Lal v. Emperor* (2), held that a High Court cannot review an order passed by itself in exercise of revisional jurisdiction and that the High Court possessed no inherent power to review its judgment before the amendments of 1923; and consequently it cannot be said that section 561-A either modifies the provisions of section 369 or clothes the Court with any fresh power. In connection with this case I may respectfully say that the learned Judges did not consider the effect of the *non obstante* clause in section 369 itself. What section 369 prohibits is the alteration or review of a "judgment" and nothing else. If the *non obstante* clause has any meaning, it has the effect of saying that in certain

(1) A.I.R. 1935 All. 66.

(2) A.I.R. 1935 All. 466.



circumstances the High Court can alter or review its own "judgment" if it is so provided in any part of the Code or any other law for the time being in force. The *non-obstante* clause can have reference only to the matter of alteration or review of judgment and to nothing else.

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A Division Bench of this Court in the case of *Sri Ram v. Emperor* (1) took the view that in order to secure the ends of justice, the High Court can correct an error which has crept in its judgment due to the attention of the court not having been invited to a mandatory provision of law. Moti Lal applicant had been sentenced to 18 months rigorous imprisonment and his revision by this Court was dismissed. Subsequently it was brought to the notice of the court that the trial was according to the summary procedure given in the Code of Criminal Procedure and the sentence in such a trial could not exceed three months. This court held that the trial was a summary one and the maximum sentence in such a trial could not exceed three months but this aspect of the matter had not been previously brought to its notice. The Bench held, under the circumstances, that it could under section 561-A correct such an obvious error in its judgment. I respectfully agree with the decision and think that the High Court could make the alteration for the sake of securing the ends of justice.

A learned Judge of this court in the case of *Chandrika v. Rex* (2), held that where an appeal was disposed of by the High Court before the date fixed for its hearing and the counsel had no opportunity of being heard, the High Court had inherent power to set aside the proceedings starting from the hearing of the appeal and terminating with the judgment. He also held that section 369 is subject to provisions of section 561-A.

(1) A. I. R. 1948 All. 106.

(2) A.I.R. 1949 All. 176.

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By the mistake of the office, this appeal was listed for hearing one day before the date fixed and was disposed of by the court in the absence of the counsel for the appellant. The learned single Judge held that the High Court had inherent power to set aside such proceedings and to rehear the appeal.

In the case of *Debi Bux Singh v. Rex* (1), a learned Judge of this Court held that where a revision application was rejected on merits, after going through the judgment of the lower court, the High Court had no power to set aside that order under section 561-A. The case of *Ghan'rika* (2) was distinguished, as it was the case of an appeal. It was observed that in a revision no party had a right to be heard and the revision having once been dismissed the applicant had no right to be heard again.

In the case of *State of Uttar Pradesh v. Bati* (3), a learned Judge of this Court followed the previous decision of this court and held that this court could review its order where a mandatory provision of law had been overlooked by the Court.

Another learned Judge of this court in the case of *Mohammad Wasi v. State* (4), held that the High Court had inherent power to review or modify its order in order to secure the ends of justice where the order was on the face of it erroneous and unjust and the defect was of such a glaring nature that it could be said that the court had no jurisdiction to pass the order or that it had in that case failed to exercise jurisdiction vested in it by law.

A learned Judge in the case of *Ram Das v. State* (5), reviewed a previous order dismissing a criminal revision for default of appearance of the applicant though the applicant had submitted a medical certificate and

(1) A.I.R. 1950 All. 299.

(2) A.I.R. 1949 All. 176.

(3) A.I.R. 1950 All. 625.

(4) A.I.R. 1951 All. 441.

(5) A.I.R. 1952 All. 926.

his counsel had sent an illness slip. It was in ignorance of the medical certificate and the slip that the criminal revision was dismissed. On correct facts being brought to the notice of the Court, the court held that it could rehear the revision.

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The case of *Jagannath Singh v. Bidheshi* (1), was a case where this court had passed an order in revision on an application under section 145, Criminal Procedure Code, in the absence of one of the parties. Subsequently an application for restoration was made, but the learned Judge dismissed it on the ground that the party had no right to be heard as the case had come up to this court under its powers of revision.

The last case of this court is the case of *Mahendrapal Singh v. State of Uttar Pradesh* (2). An attempt was made in this case for a revision to be heard on the ground that some questions of law were not previously urged by the counsel. The application for rehearing was dismissed by the learned Judge.

As regards the cases, of other High Courts on the point I do not propose to mention them individually. Most of them have been considered in the case of *Ram Autar Thakur v. State of Bihar* (3). After a consideration of those cases, the learned Judges in the above case held that the order of dismissal of a criminal revision for default did not amount to a judgment and, as such, outside the ambit of section 369. It was further held that the High Court had inherent jurisdiction to pass an order restoring a case decided by it for securing the ends of justice.

In some of the cases the view has been taken that the *non obstante* clause in section 369 is meant to refer to only three sections in the Code of Criminal Procedure namely, sections 395, 484 and 434. I do not see any reason for confining the operation of the clause to the

(1) A.I.R. 1955 All. 712. (2) 1958 A.I.J. 518.

(3) A.I.R. 1957 Pat. 33.

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above three sections. On the other hand, I think that if the Legislature wanted to make an exception only as far as those sections are concerned, it could have easily said so in section 369. In the Supreme Court case of *U. J. S. Chopra v. State of Bombay* (1), Mr. Justice S. R. DASS (as he then was) said that, assuming that section 369 applied to judgments of all the criminal courts, including the High Court, section 369 was subject also to section 439 (6) and section 430, Criminal Procedure Code. The other two learned Judges also said (page 661) that section 439(6) would be an otherwise provision, which is saved by the *non obstante* clause appearing in section 369.

Their Lordships of the Supreme Court, in the above noted case have held that the judgments pronounced by the criminal courts, including the High Court, are final and not subject to review or revision, but in this case, section 561-A of the Code of Criminal Procedure did not come up for consideration. The general rule of finality of orders and judgments would of course be applicable to all the decisions of the criminal courts, but this general rule is, in my opinion, subject to the provisions of section 561-A which expressly preserves the inherent right of the High Court in specified matters. This section begins by saying "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court. . . . While using the above words, section 369 of the Code must have been present to the mind of the Legislature. In the Code of Civil Procedure there are provisions for setting aside *ex parte* decrees, restoring suits and appeals and rehearing appeals. In addition to those provisions there is section 151, Civil Procedure Code, which reserves inherent rights of the court to pass orders preventing abuse of the process of the court and for securing the ends of justice. In the Code of Criminal Procedure

(1) (1955) 2 S.C.R. 94.

there are no provisions for setting aside *ex parte* orders and rehearing cases which have been decided once; and section 369 further bars courts generally from altering or reviewing their orders. Only the inherent right of the High Court has been reserved in section 561-A, Criminal Procedure Code, to pass necessary orders for the three purposes enumerated in the section. It would thus appear that cases cannot be reheard even by the High Court in circumstances in which the Code of Civil Procedure permits rehearing under the specific provisions made in that behalf. But principles followed in exercising inherent powers recognized in section 151, Criminal Procedure Code, can also be applied to the exercise of its inherent powers by the High Court as recognized in section 561-A, Criminal Procedure Code, for the purposes specified therein.

For the above reasons, my answer to the two questions is as follows:

(1) That this court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same.

(2) That this can be done only in cases falling under one or the other of the three conditions mentioned in section 561-A, namely—

(i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure,

(ii) for the purpose of preventing abuse of the process of any Court, and

(iii) for otherwise securing the ends of justice.

This power is to be exercised, as the Supreme Court has said in the case of *Talab Haji Hussain v. Madhukar Purshottam Mondkar* (1),

(1) A.I.R. 1958 S.C. 376.

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‘.....sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. ....’

Generally it may be stated that powers under section 561-A to rehear a case only be exercised where the facts of the case are shocking to the conscience. Section 561-A thus would not authorize this court to rehear a case where the applicant or appellant was not heard due to some fault of his or of his counsel.

*By the Court*—Our answer to the question referred is as follows:

(1) That this court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same.

(2) That this can be done only in cases falling under one or the other of the three conditions mentioned in section 561-A, namely—

(i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;

(ii) for the purpose of preventing abuse of the process of any Court;

(iii) for otherwise securing the ends of justice.

*Questions answered.*

## APPELLATE CRIMINAL

Before Mr. Justice Oak and Mr. Justice B. Dayal

ALLAHDIA AND OTHERS

v.

STATE

1958

November 6

**First Information Report by Accused**—*Admissibility of statements in—Against the accused or co-accused—Code of Criminal Procedure, 1908, s. 154.*

In the first information report lodged by A, it was, *inter alia*, stated that the premises, the place and cause of fighting, had been in the possession of the rival group and that M, A's son, was also present on the scene of occurrence. In the trial of A, M and others under ss. 304 and 323, Indian Penal Code made objection to the admissibility of these statements.

*Held*, (i) that the statement of A, the co-accused, could not be used in evidence against M, the relationship of father and son between them being of no consequence.

(ii) that there was no difficulty in receiving in evidence the statement on the factum of possession and it could be well used as an admission against A.

*Nisar Ali v. State* (1) followed on the first point and distinguished on the second.

Criminal Appeal No. 1164 of 1956 (connected with Criminal Appeal No. 1632 of 1956) from an order of R. A. Rahmani, Sessions Judge, Bijnor, dated the 2nd June, 1955, in Criminal Sessions Trial No. 6 of 1956.

The facts appear in the judgment.

J. S. David and Miss N. A. Rahman, for the appellants.

The Deputy Government Advocate for the State.

The judgment of the Court was delivered by—

OAK, J.:—These two connected appeals have been filed by three persons, Allahdia, Mohammad Saddiq and Lakhan Singh, who have been convicted by the learned Sessions Judge of Bijnor under sections 304 and 323 read with section 34, Indian Penal Code. Allahdia and Mohammad Saddiq have been sentenced to imprisonment for life under section 304/34, Indian Penal Code

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Lakhan Singh has been sentenced to rigorous imprisonment for ten years for the same offence. Each of the three men has been sentenced to rigorous imprisonment for one year under section 323/34, Indian Penal Code. The two sentences have been ordered to run consecutively.

According to the prosecution, one Lalu died leaving a good deal of property including a Rathkhana in village Buderan. Allahdia accused is a brother of Lalu deceased. Allahdia is a resident of village Malakpur adjoining village Buderan. Lalu's widow is Smt. Amiran. There was litigation between Smt. Amiran and Allahdia. She executed a sale deed with respect to the Rathkhana in favour of Idu and his brothers. Idu's brothers are Jamal Uddin *alias* Jumma, Etwari and Nazir Ahmad. Idu and his brothers took possession over the Rathkhana purchased by them from Smt. Amiran. One morning Idu and his brothers were at the Rathkhana. Thirteen men including the present three appellants attacked Idu and his brothers with *lathis* in order to take forcible possession over the Rathkhana. When Idu's mother Smt. Mariam intervened, she too was beaten by the assailants. In this way these 13 men inflicted a number of injuries on Idu, his three brothers and their mother Smt. Mariam. Injuries received by Etwari and Nazir Ahmad were serious. They died the same day as a result of their injuries. The village chaukidar lodged a report about the incident at the police station. After investigation the police prosecuted 13 persons for rioting for murder, and for causing injuries to Idu and others.

Most of the 13 accused said that they took no part in beating Idu and his relations. Mohammad Saddiq accused also said that he was not there. The plea of Allahdia accused was that he was in possession over the Rathkhana. Idu and others wanted to take forcible



possession over the Rathkhana. They attacked Allahdia with *lathis*. So Allahdia accused hit back in self-defence. Lakhan Singh accused said that he intervened on seeing the fight between Allahdia, and Idu's party. So Lakhan Singh also received injuries.

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The learned Sessions Judge was of the view that, the case was proved against only three accused, Allahdia, Mohammad Saddiq and Lakhan Singh. The court, however held that the case fell under section 304, Indian Penal Code and not under section 302, Indian Penal Code. These three accused were, therefore, convicted for causing the death of Etwari and Nazir Ahmad. They were also convicted for causing injuries to Idu and others. The three accused were sentenced as detailed above the remaining ten accused were acquitted of all the charges.

Appeal No. 1632 of 1956 has been filed by Lakhan Singh. Appeal No. 1164 of 1956 has been filed by Allahdia and Mohammad Saddiq. Mr. L. Chandra appearing for Lakhan Singh informed us that Lakhan Singh died a few days back in jail. So Lakhan Singh's appeal abates. We are now concerned with the appeal of Allahdia and Mohammad Saddiq only.

It is common ground that, there was a fight between Allahdia accused and Idu and others in the morning of 11th September, 1955. The village chaukidar lodged the report (Ex. P-12) the same day at 4 p.m. It has been proved that the same day Allahdia accused lodged a separate report (Ex. P-31) at 5 minutes after 3 p.m. When Allahdia accused was questioned by the Court about this report (Ex. P-31), he said that he had gone to the police station, but his report was not taken down. He said that he was arrested and kept in the lock-up. The report (Ex. P-31) was not his report. However, Charan Singh head constable (P. W. 5) proved that the report (Ex. P-31) was dictated by Allahdia accused at

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about 3 p.m. It is to be noted that Allahdia's report was lodged about one hour before the village chaukidar lodged his report (Ex. P-12). There was no occasion at 3 p.m. to spoil Allahdia's report. We, therefore, accept Charan Singh head constable's statement to the effect that, the report (Ex. P-31) was made by Allahdia accused.

Medical evidence shows that several persons were injured on the two sides. Jamal Uddin had four injuries. Idu had four injuries. Smt. Mariam received five injuries. Etwari deceased had three injuries in all. Injury no. 1 was a contused wound on the front of head. Injury no. 2 was swelling on the right side of head. Injury no. 3 was a contused wound on the right forearm. Internal examination showed linear vertical fracture of the right temporal and right frontal bones. Death was due to shock and haemorrhage resulting from fracture of the skull. Nazir Ahmad deceased had three injuries. Injury no. 1 was a contused wound on the top of head. Injury no. 2 was a contusion on the left wrist. Injury no. 3 was a bruise on the front part of the chest. Upon internal examination, it was found that there was a linear fracture of the left temporal bone, the right temporal bone and the parietal bones. Death was due to shock and haemorrhage resulting from the fracture of skull. Nazir Ahmad died at 10-30 a.m. on 11th September, 1955. Etwari died that day at 3 p.m. These five persons on Idu's side received 19 injuries in all.

On the other side Allahdia accused received three injuries, and Lakhan Singh accused got five injuries. Injury no. 1 of Lakhan Singh was a contused wound on the middle of the head. Injury no. 2 was a contused wound on the left ear. These two accused received eight injuries in all.

It is common ground that, there was a fight between the parties over the question of possession over Rathkhana. So an important question for decision in this appeal is whether Idu or Allahdia was in possession over the Rathkhana on 11th September, 1955. The prosecution relied upon the sale-deed obtained by Idu and his brothers from Smt. Amiran. In the first place, Smt. Amiran was not the sole heir of Lalu. Secondly, although the property was worth more than Rs.100 the sale-deed was not registered. These were defects in the sale-deed obtained by Idu and his brothers. Prosecution witnesses stated that Idu and his brothers were in possession. The learned Sessions Judge pointed out contradictions made by prosecution witnesses on the question of construction of an *osara*. Baldeo Sahai (D. W. 4) is Lekhpal of the village. He stated that he had seen Allahdia accused sitting very often at the Rathkhana. The oral evidence produced by the prosecution on the question of possession is not particularly inspiring.

However, the learned Sessions Judge relied upon the report (Ex.P-31) made by Allahdia accused himself. In that report (Ex.P-31) Allahdia dictated as follows:

"The accused persons (Etwari and others) lived in my Rathkhana for the last 15 or 20 days. My *bhawaj* Amiran.....had kept them (the accused persons). Today at 9 o'clock when I asked them to vacate the Rathkhana then all of them (the accused persons) beat me....."

This was a clear admission by Allahdia accused to the effect that Etwari and his brothers were living in the Rathkhana for 15 or 20 days prior to 11th September, 1955.

Mr. J. S. David appearing for the appellants contended that, the report (Ex. P-31) was not admissible in evidence. Reliance was placed upon *Nisar Ali v. State*

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of *U. P.* (1). In that case Nisar Ali was the appellant before the Supreme Court. His co-accused Qudratullah had made a report with the police. The question arose whether that report could be admitted in evidence. Their Lordships observed at page 367 thus:

"An objection has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 157, Evidence Act, or to contradict it under section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."

The observation "it cannot be used as evidence against the maker at the trial if he himself becomes an accused" is likely to create an impression that, a report made by Allahdia accused can never be used in evidence against him. But it must be noted that, their Lordships, in *Nisar Ali's* case (1), were considering the question whether a report made by Qudratullah accused could be utilized against Nisar Ali co-accused. It was held that Qudratullah's report could not be so used. Those observations have, therefore, to be understood in the context of that case. Their Lordships had no occasion to consider whether the report made by Qudratullah could be used against Qudratullah himself as an admission.

We see no difficulty in receiving the report Ex. P-31 as an admission against Allahdia, who made the report. In Ex. P-31 Allahdia clearly conceded that, Etwari and his brothers were living in the Rathkhana for two or three weeks before the date of the fight. It may be noted that Rathkhana is situated in village Buderan.

(1) A.I.R. 1957 S. C. 366.

Idu and his brothers were living in village Buderan just in front of the Rathkhana. The Rathkhana had no door or shutters. It was quite easy for Idu and his brothers to occupy the Rathkhana. On the other hand Allahdia accused is a resident of village Malakpur. It was difficult for him to retain possession over the Rathkhana. In view of Allahdia's admission contained in Ex. P-31 and the circumstances of the case, we agree with the learned Sessions Judge that, Idu and his brothers had entered into possession over the Rathkhana some time before the day of the fight. In other words, Idu and his brothers were in possession over the Rathkhana on 11th September, 1955.

It may be that the title of Idu and his brothers was weak. But in the present case we are mainly concerned with possession, and not title. If Idu and his brothers were in peaceful possession over the Rathkhana for two or three weeks, Allahdia accused had no right to take possession over the Rathkhana by using force. Allahdia was the aggressor. Allahdia had no right of private defence.

The prosecution examined five persons as eye-witnesses of the occurrence. The learned Sessions Judge found this oral evidence unreliable. That was why it became necessary to acquit most of the accused persons. Allahdia admitted his fight with Idu's party. Lakhan Singh also admitted his presence there. He received a number of injuries. As regards Mohammad Saddiq accused the learned Sessions Judge observed:

"He is Allahdia's son. Though he was not injured but his presence in the *marpit* is admitted by Allahdia himself in his report Ex. P-31."

It seems that the learned Sessions Judge convicted Mohammad Saddiq accused, because his presence was admitted in the report (Ex. P-31) made by Allahdia accused. Now, as explained in *Nisar Ali's* case (1) quoted

(1) A.I.R. 1957 S.C. 366.

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above, the report (Ex. P-31) made by Allahdia accused could not be used in evidence against his co-accused Mohammad Saddiq. It makes no difference merely because Allahdia and Mohammad Saddiq are father and son. If we exclude the report (Ex. P-31) as regards Mohammad Saddiq accused, his case appears to be almost similar to that of the ten accused who have been acquitted. The case has not been proved against Mohammad Saddiq accused.

It has been proved that Allahdia and Lakhan Singh jointly attacked Idu, his brothers and Smt. Mariam. The attack appears to have been made in furtherance of the common intention to take forcible possession over the Rathkhana. So section 34, Indian Penal Code, is applicable.

The question arises whether the case falls under section 302, Indian Penal Code or under section 304, Indian Penal Code. It is true that two persons Etwari and Nazir Ahmad died in this incident. However, it is to be noted that, two accused also received injuries in the fight. This was a fight between the two parties with *lathis*. Etwari and Nazir Ahmad were alive for a few hours after receiving their injuries. Each of them received only three injuries. The learned Sessions Judge remarked that the assailants did not intend to cause death. That view appears to be correct. The Court, however, held that the case fell under Part I of section 304, Indian Penal Code. If intention to cause death is ruled out, the prosecution had to prove that the offenders intended to cause such bodily injury as was likely to cause death, in order to bring the case under Part I of section 304, Indian Penal Code. Considering the circumstances under which Etwari and Nazir Ahmad were beaten by Allahdia and Lakhan Singh accused, it seems doubtful whether the accused intended to cause such bodily injury as was likely to

cause death. When the offenders struck Nazir Ahmad and Etwari with *lathis* on their heads and caused fractures of skull bones, the offenders must have known their act was likely to cause death. So the case falls under paragraph 2 of section 304, Indian Penal Code. Since two persons were killed this appears to be a fit case for awarding the maximum sentence of imprisonment under paragraph 2 of section 304, Indian Penal Code in spite of Allahdia's old age (60) years. Allahdia's conviction under section 323/34, Indian Penal Code is also proper. The two sentences may be made concurrent. Mohammad Saddiq accused must be acquitted of both the charges.

Appeal no. 1632 of 1956 filed by Lakhan Singh has abated.

Appeal no. 1164 of 1956 is partly allowed. We alter Allahdia's conviction from paragraph 1 of section 304 to paragraph 2 of section 304, Indian Penal Code, read with section 34. Under section 304/34, Indian Penal Code we sentence Allahdia to rigorous imprisonment for ten years. His conviction and sentence under section 323/34, Indian Penal Code will stand. The two sentences passed upon Allahdia for the two offences shall run concurrently. We acquit Mohammad Saddiq of the charges under sections 304/34 and 323/34, Indian Penal Code. Mohammad Saddiq shall be released immediately, unless he is required in any other case.

*Appeal partly allowed.*

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## APPELLATE CRIMINAL

*Before Mr. Justice Mulla\**

C. N. PETERS

v.

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1959 **Criminal Trial—Accused—Several statements of the accused,**  
February 5 *admissibility of—Criminal Procedure Code, 1898, ss. 342*  
*and 251-A, scope of.*

It is proved that the accused made an illegal demand and K. N. Lal the Railway guard paid Rs.300 as illegal gratification. The accused made his first statement on the 14th February, 1955 at the time when the trap was laid. The accused made several other statements, his second statement on the 10th April, 1956 and his third statement on the 14th May, 1956 and that the statement on 5th November, 1956 and his last statement on 24th January, 1957.

*Held*, that there is only one provision of law viz. s. 342, Criminal Procedure Code under which the statements of the accused are recorded. No statement of an accused person is recorded under any other section and s. 251-A, Criminal Procedure Code only mentions the stage at which the statement is to be recorded. It will be erroneous to say that any statement of an accused is recorded under s. 251-A, Criminal Procedure Code. A trial court has a right to put any question to an accused person at any stage and the record of every such statement of the accused would be under s. 342, Criminal Procedure Code. Every statement of the accused stands on the same footing and it is incorrect to distinguish between the statements of the accused person and to say that one statement is more important than the other. Consequently all the statements of the accused are admissible in evidence.

*State v. Sitaram Dayaram Kachhi* (1), dissented from, *Vijendrajit v. State of Bombay* (2) distinguished.

Criminal Appeal no. 292 of 1957 against the order of K. L. ARORA, Special Judge, Anti-Corruption, U. P., Lucknow, dated 13th May, 1957.

The facts appear in the judgment.

*Manik Chanc Jain* and *Nirankar Nath Saxena*, for the appellant.

\*Sitting at Lucknow.

(1) A.I.R. 1958 M. P. 99.

(2) A.I.R. 1953 S.C. 247.



*Badruzzaman*, holding brief for the Additional Government Advocate for the State.

The judgment of the Court was delivered by—

MULLA, J.:—Sri C. N. Peters has been convicted under section 161, Indian Penal Code and sentenced to 15 months' rigorous imprisonment and a fine of Rs.300 in default further rigorous imprisonment for 3 months by Sri K. L. ARORA, Special Judge, Lucknow. The charge against the appellant is that he demanded and received illegal gratification from Kalapnath Lal guard on the 14th of February, 1955, at about 4 p.m. in the Guards' Running Room at Gorakhpur railway station.

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The prosecution story is that the appellant was posted at Gorakhpur as the Claims Prevention Inspector in the North Eastern Railway. Kalapnath Lal was a Guard in the same Railway with his headquarters at Gonda. On the 8th of February, 1955, Kalapnath had taken a goods train from Gonda to Gorakhpur and when the train reached Gorakhpur it was found that some bags were stolen away from one of the wagons in the train. A report was made to the Government Railway Police and enquiries were started. The appellant who was present at Gorakhpur joined this inquiry of his own without being directed to do so. On the 9th of February, 1955, the appellant demanded Rs.300 from Kalapnath guard as illegal gratification telling him that he will give a favourable report, but if this money was not paid to him, he will give an adverse report. Kalapnath did not like to part with Rs.300 and so he went to Sri D. D. Pathak, a Railway Sectional Officer attached to the Special Police Establishment and he handed a written report to him on the 11th of February, 1955. Sri Pathak contacted the Superintendent of Police, Special Police Establishment and Sri M. A. Ahmad, Inspector of Police was deputed to lay a trap. This trap was accordingly laid on the 14th of February and

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it was arranged that the illegal gratification should be paid in the Guards' Running Room at about 4 p.m. In the trap two independent witnesses were also included. The witnesses who were present at the time when this money was handed over to the appellant were (1) Sri Istafa Husain, M.L.A., (2) Sri S. C. Dhar, (3) Sri D. D. Pathak, (4) Sri R. B. Singh, (5) Sri K. B. Khare, (6) Sri Nakchhed Tewari, and (7) Inspector M. A. Ahmad. Out of the seven witnesses named above two were Railway Sectional Officers, two were railway guards, one was an inspector of police and two were independent persons. The transaction was watched by these witnesses who also heard the talk that preceded the transaction. The moment the money was handed over and pocketted by the appellant Sri M. A. Ahmad disclosed his identity and took the search of the appellant. It may be mentioned that the numbers of the notes which constituted Rs.300 paid as illegal gratification were noted down earlier and their list was prepared. These Rs. 300 were recovered from the pocket of the appellant, who produced them himself. When the numbers were compared, they were found to be the same lot. Sri M. A. Ahmad asked the appellant to explain the presence of these notes with him and thereupon the appellant wrote down a statement in his own hand which is marked Ex.P-3. Sri Istafa Husain then recorded the recovery memo and this was signed by the other witnesses also. Sri M. A. Ahmad then procured the necessary sanction and after investigating the case prosecuted the appellant.

The defence of the appellant is not easy to understand. He has been changing his defence from place to place and from court to court. In Ex. P-3 the statement which he made spontaneously on first questioning, he took up the stand that these Rs.300 were taken by him from Kalapnath as a loan. In his second statement

made before Sri Zutshi on the 10th of April, 1956 he took up the following stand:

Q. It is a fact that you obtained a sum of Rs.300 in G. C. Notes from Sri Kalapnath Lal on 14th February, 1955 as illegal gratification for showing official favour to him?

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A. The sum of Rs.300 was given to me by Sri Kalapnath Lal on 14th February, 1955 at about 4 p.m. to be given to the officer who would have dealt with his case. I took that amount under pressure of certain, friends to do a good turn to Sri Kalapnath Lal with definite understanding that it would be returned to him in case the officer dealing with his case refused to accept that money within two or three days.

Q. Did you realize at the time that your acting as go-between was departmentally objectionable and also illegal?

A. I did not realize the gravity of receiving such tainted money for payment to another departmental officer as I had no intention to pay such money to any officer but to return it to Sri Kalapnath Lal himself.

Q. Is it a fact that after counting the G. C. Notes of the total value of Rs.300 you put them in the right inner pocket of your coat?

A. I never counted the G. C. Notes but I did pocket them.

Q. Did Inspector, M. A. Ahmad ask you whatever you wanted to say by way of explanation or otherwise about your having accepted the sum of Rs.300 from Sri Kalapnath Lal, Guard?

A. Yes.

Q. Is the statement now marked Z after being shown to you the same statement under your signature and in your writing that you furnished to Inspector, M. A. Ahmad on his inquiry?

A. Yes.

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The third statement of the appellant was recorded on the 24th of May, 1956. It is on the same lines as the earlier statement dated the 10th of April, 1956, but certain other admissions were made by the appellant and I will incorporate the relevant questions and answers. They are as follows:

Q. Is it a fact that after you pocketed the money, Messrs. Istafa Husain, S. C. Dhar, R. S. O., D. D. Pathak, R. S. O., R. B. Singh Guard, K. B. Khare Guard, Nakchhed Tiwari and Inspector, M. A. Ahmad arrived at the spot?

A. Yes, it is correct; six or seven persons did reach there about the same time. Out of these 6 or 7 persons, only two were known to me from before and they were R. B. Singh, Guard and K. B. Khare, Guard, others were strangers to me. One of these strangers also disclosed his identity to me as M. A. Ahmad, Inspector Police. D. D. Pathak was also known to me, but he did not reach there immediately, he had come shortly after. I did not know Istafa Husain, S. C. Dhar and Nakchhed Tiwari at that time at all, but now I have come to know them, it is correct as well that these three named persons had also reached there on that day.."

As regards Ex. Z (which is now Ex. P-3) a further question was put at this stage which is also important.

Q. Is this correct as well?

A. No it was not correct. I did not accept this amount of Rs.300 from Sri Kalapnath Lal as a loan at all. This mistaken statement was noted by me because of my confusion."

The fourth statement of the appellant was recorded on the 5th of November, 1956. The appellant took up an

entirely new stand in this statement. I will again quote the relevant questions and answers:

Q. Is it a fact that you obtained a sum of Rs.300 in G. C. Notes from Sri Kalapnath Lal on 14th February, 1955 as illegal gratification for showing official favour to him?

A. No this is incorrect. I did not obtain any such amount from Kalapnath Lal as illegal gratification at any time. Kalapnath Lal did pay Rs.300 to me in the Guards' Running Room on that very day and this was the amount borrowed by Kalapnath Lal from me previously which was so returned by him to me on that day.

Q. Can you state when this amount was borrowed from you by Kalapnath Lal?

A. Kalapnath Lal had borrowed Rs.500 from me about 1 or 1½ years previous to this refund of Rs.300. Rs.200 had already been refunded to me earlier in instalments, while this amount of Rs.300 was refunded to me in full discharge of his liability on that very day.

The appellant then admitted that he had placed these Rs.300 in his pocket. He also admitted the presence of the prosecution witnesses immediately after he had received this money. He also admitted that when Sri M. A. Ahmad asked him for his explanation, he wrote out Ex. Z (Ex. P-3) and handed it over to him. I will, however, repeat the question and answer relating to this point because the counsel for the defence objected to the question put by the Court:

Q. Is the statement now marked 'Z' after being shown to you the same statement under your signatures and in your writing that you handed over to Inspector M. A. Ahmad on his enquiry?

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A. Yes, this written explanation was tendered by me to Sri M. A. Ahmad at that very time.

(NOTE—This question was objected to by the learned defence counsel, but the objection was over-ruled).

Q. Was this explanation of yours correct as well?

A. No. This explanation of mine was not correct. This statement shows as if I had borrowed the amount of Rs.300 as a loan from Kalapnath Lal, but the real fact was otherwise; Kalapnath Lal had borrowed a loan from me, and this amount of Rs.300 was refunded by him to myself. This wrong explanation was given by me in writing because of confusion.

Q. Were you examined as an accused in the Court of Sri B. N. Zutshi, Special Judge on 10th April, 1956?

A. Yes, I was examined in that court, but I do not remember the date of that statement.

Q. Did you give the statement as shown to you and marked 'A' by this court?

A. Yes, I did give this statement.

NOTE—The attention of the accused was specially drawn to Q. No. 13 and the reply recorded in the above statement, which was specially read over to him).

Q. Do you want to offer any explanation why you have now given a contrary statement in this Court today?

A. My statement in the court of Sri B. N. Zutshi has been wrong. I had given that wrong statement because of confusion and also because I was given to understand by Sri D. D. Pathak that if I confessed my fault, I will escape punishment.

Q. Why this false case has been concocted against you?

A. This false case has been concocted against me by Kalapnath Lal, against whom I was making enquiry, and in order to save his own neck.

The last statement of the appellant was recorded on the 24th of January, 1957, but there is nothing in this statement which need be quoted.

The appellant in defence examined five witnesses. One of them did not support the defence version at all and was declared hostile by the defence. The remaining four witnesses do not help the defence case at all. They only prove that the money was not paid at the place suggested by the prosecution but outside in the verandah. The only important defence witness is Sri Satyapal Singh (D. W. 3), but his evidence also is of no use, for even if it is accepted in its entirety it would only show that Kalapnath was wanting to meet the appellant. The trial court has dealt with the evidence of these defence witnesses in detail and has very rightly come to the conclusion that this evidence is worthless.

I have quoted from the statements of the appellant, because it is admitted by the appellant that the tainted money reached his hands. Once the prosecution establishes the receipt of the tainted money by an accused person, then an onus is cast on the accused to rebut the presumption against him and offer an explanation. Section 4 of the Prevention of Corruption Act runs as follows:

"Where in any trial of an offence punishable under section 161 or section 165 of the Indian Penal Code, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as

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the case may be, without consideration or for a consideration which he knows to be inadequate:

Provided that the court may decline to draw such presumption if the gratification or thing aforesaid is in its opinion so trivial that no inference of corruption may fairly be drawn."

A sum of Rs.300 cannot by any means be described as trivial. A presumption, therefore, arose against the appellant and it was for him to rebut this presumption. The appellant in his attempt to rebut this presumption has taken several stands which are incorporated in the extracts quoted above. The multiplicity of these stands by itself destroys the *bona fides* of any one of these stands. These stands are on the face of them unbelievable and they are quite inadequate to rebut the presumption against the appellant. The appellant started by claiming that he had taken a loan and ended by taking up the stand that he had realized a debt. In between he accepted that this money was taken by him to be given as illegal gratification to some superior officer in order to help Kalapnath Lal. I am, therefore, satisfied that the appellant stands condemned by his own statements irrespective of the evidence led by the prosecution. Advances of Rs.300 are usually given either on the basis of a pronote or at least some writing is taken from the person to whom the money is advanced, even if it is a transaction between friends.

As regards the last stand taken up by the appellant that also cannot bear analysis. The appellant admitted that the first Rs.200 were paid in several instalments and yet he contends that a bigger sum of Rs.300 was paid by Kalapnath Lal just in one lump sum. There is also evidence that Kalapnath Lal collected Rs.100 from a witness in order to make up this sum of Rs.300. I fail to understand that if Kalapnath Lal had to incur a fresh debt to make this payment why should he pay back the



entire amount and not pay only Rs.200 to the appellant. The appellant was not charging any interest nor was he pressing Kalapnath for repayment. I am, therefore, satisfied that the defence is merely a desperate attempt of a sinking man to clutch at straws. The position he had taken earlier amounted to a confession of guilt, for this was no defence in law that he was not going to pocket this money himself, but was going to offer it to some other superior officer. When this was realized that the statement given by the appellant was by itself incriminating it had to be changed and the explanation offered at the last stage is quite unbelievable and cannot be accepted.

Again, if the last explanation of the appellant is sound, there was no reason for Kalapnath Lal to report against the appellant and contact the authorities so that a trap should be laid. The appellant as a matter of fact was a benefactor of Kalapnath Lal, for he advanced Rs.500 to him without any bond or paper and gave plenty of time to Kalapnath Lal to pay back this amount. He was also not pressing his demand and Kalapnath Lal voluntarily paid him a lump sum of Rs.300 and then got him falsely implicated. It does not stand to reason at all.

The trial court has discussed the evidence of the prosecution witnesses and has reached to right conclusions. There are clear indications that the appellant unnecessarily interfered with this inquiry and took down unfaithful statements in order to make Kalapnath Lal feel a little nervous. This can only be interpreted as an exercise of pressure to coerce Kalapnath Lal to meet his demand. The evidence of the independent witnesses who were associated with this trap is also absolutely respectable and convincing. Sri Istifa Husain, M.L.A., is a witness who showed his responsibility as a citizen when he agreed to associate himself with this trap. I only

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wish other responsible citizens would also agree to help the investigating agency in such matters. Sri Istafa Husain had no animus against the appellant and admittedly the appellant did not even know him from before. He occupies a status and he could not have been under the influence of the police. His statement therefore, deserves the highest consideration and he not only supports the story that Rs.300 were recovered from the possession of the appellant, but he also supports the talk that preceded this transaction. He proves that a demand of illegal gratification was made and then Kalapath Lal paid this amount. I am, therefore, of the opinion that the case against the appellant is fully proved by the statement of Sri Istafa Husain alone irrespective of all other evidence. The other witnesses also give the same version and there is no reason why their statements should not be believed. It is, therefore, established that an illegal demand was made and Kalapath Lal paid Rs.300 as illegal gratification to the appellant.

Now I will deal with some of the contentions advanced before me by the counsel for the appellant. Really there are two points of law that have been pressed before me. The first point is that the earlier statements made by the appellant are inadmissible in evidence and the only statement which can be considered is the statement dated the 24th of January, 1957. The argument is that Ex. P-3 was a statement made during the course of investigation and so it is hit by section 162, Criminal Procedure Code. As regards the statements dated the 10th of April, 1956, the 24th of May, 1956 and the 5th of November, 1956, it was contended that they were statements under section 251-A, Criminal Procedure Code and they cannot be used as evidence against the appellant. In continuation of this argument it was contended that only the statement dated the 24th

of January, 1957 was a statement under section 342, Criminal Procedure Code and the contents of this statement alone can be used against the appellant.

As I have believed the prosecution witnesses these contentions really do not arise and I would not have even considered these arguments advanced before me if there had not been a decision of the Madhya Pradesh High Court, which partly supports these contentions. This decision is in *State v. Sitaram Duyaram Kachhi* (1). This is a Bench decision and reliance has been placed on the following extract in this decision:

"The consideration of the documents referred to in section 173, Criminal Procedure Code, and the examination, if any, of the accused under the provisions of sub-sections (2), (3), (4) and (5) of section 251-A, Criminal Procedure Code is only for the purpose of determining whether *prima facie* there is any ground for discharging the accused and for presuming that he has committed an offence. The examination of the accused under section 251-A, Criminal Procedure Code, must necessarily be with regard to the material against him in the documents referred to in section 173, Criminal Procedure Code, and the answers given by the accused during such examination explaining those documents can at the most be the material on which a Magistrate can discharge the accused or frame a charge against him.

But the answers given by the accused do not constitute any evidence either for or against him. That being so, section 342(3), Criminal Procedure Code, which applies to the answers given by the accused when he is asked to explain any circumstances appearing in the evidence against him, cannot be said to be applicable to answers given by the accused under section 251-A when he is examined before the framing of the charge."

(1) A. I. R. 1958 M. P. 99.

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The learned Judges in support of this opinion referred to a decision of the Supreme Court in *Vijendrajit v. State of Bombay* (1). With all respect to the learned Judges who gave the Madhya Pradesh decision, the view of the law taken by them does not appeal to me. I looked into the Supreme Court decision and the way I understood that decision, it was no authority for the proposition of law laid down by the learned Judges. Even the counsel for the appellant could not rely upon the decision of the Supreme Court quoted above as an authority for the proposition laid down by the learned Judges. It seems to me that the learned Judges came to the conclusion that a statement under section 251-A, Criminal Procedure Code, is different from a statement recorded under section 342, Criminal Procedure Code. In my opinion there is only one provision of law in the Criminal Procedure Code under which the statements of accused persons are recorded. That provision of law is section 342, Criminal Procedure Code. No statement of an accused person is recorded under any other section and section 251-A, Criminal Procedure Code only mentions the stage at which the statement is to be recorded. In my opinion it is erroneous to say that any statement of an accused is recorded under section 251-A, Criminal Procedure Code. A trial court has a right to put any questions to an accused person at any stage and the record of every such statement would be under section 342, Criminal Procedure Code. Section 342, Criminal Procedure Code, however, makes it mandatory that the accused must be examined at one particular stage. Every statement of the accused, therefore, stands on the same footing and in my opinion it is incorrect to distinguish between the statements of the accused person and to say that one statement is more important than the other.

(1) A.I.R. 1953 S.C. 247.

I have approached this question from another angle and I find that the view expressed above is not consistent with the frame work of the Criminal Procedure Code. A statement under section 251-A, Criminal Procedure Code, when it is taken by the Special Judge, is made in open court and usually the counsel for the accused is present. The accused is, therefore, in a better position to give a true statement and put forward his defence. Under the Criminal Procedure Code, a statement recorded by a Magistrate under section 164, Criminal Procedure Code, if it amounts to a confession, is sufficient to hold him guilty. If the trial court comes to the conclusion that the statement made by the accused before the Magistrate was voluntary and true, it can convict the accused on the basis of that statement. Obviously a statement under section 164, Criminal Procedure Code is made in circumstances where the accused is in a far more unfavourable situation. A counsel is not present at that time near the accused and the Magistrate may record this statement either in open court or in his private chambers or even at his house. The Legislature could never have contemplated that statement under section 164, Criminal Procedure Code should possess more evidentiary value than a statement recorded at the stage of section 251-A, Criminal Procedure Code.

Again, I find that in a Session Trial, the case begins with the plea of an accused person. At that time there is no evidence on the record barring a charge-sheet. Even this charge-sheet is not final, for the Sessions Judge either accepts the charge-sheet or amends that charge-sheet. Under section 271(2), Criminal Procedure Code an accused can be convicted on his plea of guilty alone. This is another matter that as a rule of prudence and caution the courts usually do not convict the offenders on their plea of guilty, but there is no bar in law to convict them if they plead guilty. It is inconceivable

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to me that in a murder case an accused may be convicted on his plea of guilty, but in the cases which are done by the Special Judge, even a statement at the stage of section 251-A, Criminal Procedure Code possesses no evidentiary value. I cannot accept this position. In my opinion a statement at the stage of section 251-A, Criminal Procedure Code possesses just as much evidentiary value as the statement recorded later on after the evidence is recorded. They supplement each other and are parts of the same statement.

I may at this stage also mention that under section 277 of the Code of Criminal Procedure, the statement made by an accused in a Sessions case before the committing Magistrate is brought on record and is made substantive evidence. It seems incredible to me that a statement recorded by another court can be used as evidence by the trial court, but the statement which it has recorded itself cannot be used as evidence against an accused person. It is not necessary to multiply these reasons. I am satisfied that the statements recorded at the stage of section 251-A, Criminal Procedure Code are just as much an integral part of the statement of an accused as his subsequent statement. Any facts accepted in these statements can be used as evidence by the trial court. I am, therefore, of the opinion that the trial court was justified in taking into account the irreconcilable conflict that existed in the various statements of the appellant. It would have committed a grave error in assessing the evidence if it had not done so.

Even if the view taken by the Madhya Pradesh High Court is correct, it will not help the appellant in this case. In the statement dated the 5th of November, 1956, all these earlier statements were put to the appellant and he had offered explanation for making these earlier statements. They thus become a part of his statement dated the 5th of November, 1956. If it is held that even his statement cannot be used in evidence

dence then it seems that the appellant has offered no explanation as to how this money reached his hands. It is in this statement alone that he has suggested the story of a refund by Kalapnath Lal. It cannot be held that one part of this statement is admissible and the other part is inadmissible.

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There is another aspect of the case on which I would like to comment. The statements of the accused are of two kinds. There are exculpatory statements and inculpatory statements. While inculpatory statements should be accepted with a great deal of caution and unless the law permits it, they should be excluded from consideration, but exculpatory statements cannot be placed on the same footing. An exculpatory statement is the defence of the appellant and not a statement from which any inference of guilt can be drawn against him. The three stands taken by the appellant in this case were all exculpatory statements. None of them was an inculpatory statement and, therefore, these exculpatory statements cannot be excluded from consideration. That the appellant was changing his position time after time is another matter, but at every stage he was denying his guilt and was putting forward a different explanation.

The other question on which arguments were addressed to me was that Ex. P-3 was inadmissible in evidence, as it was a statement given by an accused during the course of the investigation. It is not necessary for me to decide this point. Whether the investigation had started when the accused gave this statement to the investigating officer or not is not free from doubt. The appellant gave a spontaneous explanation right at the moment when the crime was committed and, therefore, his first explanation amounted to *res gestæ* within the meaning of section 6 of the Indian Evidence Act.

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Illustration (a) of section 6 of the Indian Evidence Act, runs as follows:

"A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

I have no doubt that the statement Ex. P-3 was part of the same transaction, but as I have observed above it is possible that the investigation had started earlier when this statement was made and so it may not be admissible because of the provisions of section 162, Criminal Procedure Code. In cases under section 109, Criminal Procedure Code evidence is always led that the moment the accused was apprehended, he gave unsatisfactory answers and did not disclose his name but gave fictitious names. Is this evidence inadmissible according to section 162, Criminal Procedure Code? If this evidence is admissible, then in my opinion the spontaneous statement made by an accused when an explanation is sought should also be admissible, especially when the statement is of an exculpatory character. It amounts to the conduct of an accused person and so is relevant under section 8 of the Indian Evidence Act. However, I am not willing to give any definite opinion on this point.

In view of my findings and conclusions, I hold that the case against the appellant is fully established. The sentence awarded to him cannot be said to be excessive. This appeal is, therefore, dismissed. The appellant is on bail. He should surrender forthwith to serve out the sentence. The fine should be deposited within one month.

*Appeal dismissed.*



## APPELLATE CIVIL

Before Mr. Justice Tandon.\*

FIRM MATTOO LAL BALDEO PRASAD  
(APPELLANT),

v.

SHRIMATI SHANTI DEVI (RESPONDENT)

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**Execution of the Decree**—*Cash compensation attachment of—*

*U. P. Zamindari Debt Reduction Act, 1952, s. 9, scope of.*

*Held*, that s. 9 of the U. P. Zamindars Debt Reduction Act limits its scope by confining its benefit to those cases only where attachment and sale of bonds is asked for and it does not apply where cash compensation alone is sought to be followed in execution of a decree.

Execution Second Appeal no. 18 of 1954 against the decree of S. A. Ahsan, District Judge of Rae Bareilly, dated 24th May, 1954.

The facts appear in the judgment.

N. Banerji for the appellant.

R. N. Shukla for the respondent.

TANDON, J.:—These are two appeals arising out of the same order passed on appeal by the learned District Judge, Rae Bareilly, dated the 24th May, 1954. In both the appeals Firm Mattoo Lal Baldeo Prasad is the appellant and Srimati Shanti Devi, as widow of Thakur Udai Bhan Singh, is the respondent. The facts are as under:

The appellants have a decree for money against the estate of Udai Bhan Singh in the hands of his widow which had been obtained on the foot of a promissory note executed by the deceased. The decree-holder appellants executed the above decree by proceeding against the interim compensation granted under the Zamindari Abolition and Land Reforms Act, to the respondent in respect of cer-

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tain zamindaris belonging to her and acquired under the Zamindari Abolition and Land Reforms Act. There was some difficulty in deciding whether the execution application, out of which the present appeals have arisen, was directed against the entire compensation, inclusive of the interim compensation, awarded to the respondent under the said Act, but Sri *N. Banerji* appearing for the appellant has stated that the execution in point was against the interim compensation only. It is in this context therefore that the two appeals will need to be decided.

Under rule 47 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules interim compensation is made payable in cash. It is not clear from the record whether the interim compensation which the decree-holder appellants had asked to be paid over to them was in fact so made over to them though the learned counsel for the respondent has informed that this amount along with the rest of the compensation was realized by the respondent in the form of bonds from the Compensation Officer. Whatever the correct position may be, the fact with which we are concerned in these appeals remained that the decree-holders execution was against the interim compensation which was payable in cash. They had not asked the bonds in respect of compensation to be attached or sold.

Section 9 of the Uttar Pradesh Zamindars Debt Reduction Act, 1952, has made provision that where a decree to which that Act applied for other than a secured debt is executed by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant for his

estate, the Court executing the decree shall enter satisfaction in accordance with the formula given in Schedule II of that Act. The lower appellate Court has, in view of the provision in the above section requiring satisfaction to be entered in accordance with the formula given in Schedule II, directed the executing Court to institute an inquiry and enter satisfaction of the decree in accordance with the formula in the Schedule. The appellants are contesting this order on the ground that section 9 under which the learned District Judge has made the direction is not attracted in the case of interim compensation which is payable in cash. It is applicable to those cases only where the decree-holder wants to execute his decree by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant.

Section 9 has used the words "where a decree to which this Act applies relating to other than a secured debt is executed by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant for his estate."

Its provisions are thus attracted when execution is sought by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant. Interim compensation is payable in cash. Moreover, the section on its plain language is applicable to cases where execution is by attachment and sale of the bonds. Learned counsel for the respondent has contended that the bonds granted under the Zamin-dari Abolition and Land Reforms Act are in respect of compensation for the estates acquired under that Act, the interim compensation too is part of the compensation for the same acquisition. Thus any distinction

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between compensation payable in cash would in his opinion be discriminatory and against the true intention underlying section 9. The true intention of the section has to be read and gathered from the words used by it. The Legislature has in using the expression "is executed by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant" limited its scope by confining its benefit to those cases only where attachment and sale of bonds is asked. It is hardly necessary to point out that so long as the language of the law is clear all considerations about what the law might or ought to have been are beside the point. Section 9 is clearly applicable to those cases only where the decree is executed by attachment and sale of the bonds. There is no ambiguity in the section and in its absence, it must be held to apply to those cases only where execution is asked by attachment and sale of the bonds.

It will not be out of place to mention that in this very Act the legislature has used the comprehensive term "compensation", which included both interim and final compensation, wherever the intention was to make the provision applicable to compensation as a whole. Section 8 is one instance of it. For the above reason too, therefore, section 9 must be held to apply to those cases only where execution is sought "by attachment and sale of bonds on account of compensation or rehabilitation grant."

The order of the learned District Judge remanding back the case to the executing court was under the circumstances clearly wrong. Since the cash compensation alone was sought to be followed and there was no request for attachment or sale of the bonds, an inquiry in accordance with Schedule II was unnecessary. These appeals should therefore succeed. They are accordingly allowed. The order passed by the lower appellate

Court is set aside. This order will not affect the other ground, including the ground as to the applicability of section 9 of the Uttar Pradesh Zamindars Debt Reduction Act, in the event of execution being sought against bonds in respect of compensation or rehabilitation grant. The appellants will get their costs from the respondent.

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*Appeals allowed.*

### CIVIL MISCELLANEOUS

*Before Mr. Justice Mukerji and Mr. Justice Nigam.\**

BALDEO RAM AND ANOTHER (APPLICANTS),

*v.*

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13.

THE DEPUTY COMMISSIONER, GONDA AND  
ANOTHER (OPPOSITE-PARTIES).

**Allahabad High Court—Jurisdiction of Lucknow Bench—Sale of liquor shop—Sale set aside, appeal by the first auction purchaser—Appeal allowed and resale ordered—Sale at Gonda—Excise Commissioner at Allahabad—No notice to the 2nd auction purchaser—U. P. High Courts (Amalgamation) Order, 1948, proviso to clause 14, "cases arising", meaning of—Writ petition, maintainability of.**

Patandin was granted a licence for the liquor shop in mohalla Naushera and Jagat Narain was granted a licence for the liquor shop in mohalla Pure Ghose in an auction held by the Excise Authorities in Gonda. Both of them did not deposit the sale money and the sale in their favour was set aside and a fresh sale was held in which the present petitioners were the highest bidders of the above two liquor shops. Patandin and Jagat Narain filed appeals against the setting aside of the sale and the resale to the Excise Commissioner at Allahabad and their appeals were allowed. The licences of the petitioners were consequently terminated and a fresh sale was to be held on 2nd December, 1958.

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visio to clause 14 of the United Provinces High Court (Amalgamation) Order, 1948, is the territory from where a cause has arisen in respect of which the powers to issue a writ are to be exercised. If Judges sitting at Allahabad could issue a writ of *certiorari* to quash the order of the Excise Commissioner then the same order could be passed by Judges of the Lucknow Bench provided the origin of the cause in respect of which the order was to be made arose or originated within an area from where cases could be filed at Lucknow.

(ii) also that Gonda was the place of origin of the case which culminated at Allahabad and the High Court Bench at Lucknow has the jurisdiction to issue an order in this writ petition.

(iii) also that this petition is not maintainable on the ground that the petitioners had another equally efficacious remedy open to them inasmuch as the petitioners may file a petition of revision to the State Government against the order of the Excise Commissioner under rule 130 of the Excise Manual.

(iv) also that this petition is not maintainable as there is nothing to show that there was any error apparent on the face of the record or that there was any failure of natural justice as there are no rules which have been contravened by the Appellate Authority, who did not issue any notice to the petitioners when hearing the appeal.

*Nagendra Nath v. Commissioner of Hills Division* (1), relied on.

Writ Petition no. 279 of 1958 under Article 226 of the Constitution.

The facts appear in the judgment.

*Niamat Ullah and Lekh Ram Verma*, for the applicants.

The Junior Standing Counsel *Uma Shanker Srivastava*, for the opposite-parties.

The judgment of the Court was delivered by—

MUKERJI, J:—This is a petition under Article 226 of the Constitution praying among other the following reliefs :

“(a) The issue of a writ of *certiorari* or any other suitable order or direction quashing the orders of the opposite-party no. 2 (i.e. the Excise Commissioner, Uttar Pradesh, Allahabad) setting aside the resale by auction of the two liquor shops in dispute in favour of the applicants, and quashing the order of opposite-party no. 1 (i.e.

(1) A. I. R. 1958 S. C. 398.

the Deputy Commissioner, Gonda, exercising powers under the Excise Act) fixing the date of resale thereof on the 2nd December, 1958.

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(b) The issue of a writ of *mandamus* ordering the stay of resale by auction of the two liquor shops."

The facts that have given rise to this petition may be briefly stated in order to appreciate the question that fell for our determination. The excise authorities in Gonda held an auction for the purposes of granting a licence to the highest bidder for the liquor shops, one in mohalla Naushera and the other in mohalla Pure Ghose in the town of Gonda. Patandin was granted a licence for the shop in mohalla Naushera, while Sri Jagat Narain was granted licence for the shop in mohalla Pure Ghose, as they happened to be the two highest bidders. The aforementioned persons failed to deposit the amount of the sale money, so that, the sale in their favour was set aside and a fresh sale was held at which the petitioners, before us, were the two highest bidders in respect of the two shops, one at Naushera and the other at Pure Ghose. The previous bidders, namely, Patandin and Sri Jagat Narain, preferred appeals against the setting aside of the sale and the resale to the Excise Commissioner at Allahabad, and their appeals were allowed. On the 20th of November, 1958, the petitioners were informed that as a result of the appeals of Patandin and Sri Jagat Narain succeeding, their licences had to be terminated and were terminated and that a fresh sale in consequence was to be held on the 2nd of December, 1958.

The petitioners challenged the validity of the action that was taken by the Excise Commissioner in allowing the appeal and setting aside the sale. They also challenged the order of the Deputy Commissioner directing a fresh sale to be held on 2nd December, 1958. One of the main contentions raised by the petitioners

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against the order of the Excise Commissioner was that they did not get an opportunity of being heard and that without hearing them an order which was prejudicial to them had been passed and, therefore, the order was liable to be quashed.

When this petition came up for hearing before a learned single Judge a preliminary objection was taken on behalf of the State to the effect that the Bench sitting at Lucknow had no jurisdiction to entertain, or pass orders on, the petition. The learned single Judge, therefore, thought it desirable to have this case put up before a Bench of two Judges. The case has now been put up before us and counsel for the parties first argued the preliminary point, namely, whether the Lucknow Bench had jurisdiction to entertain, or pass orders on, this petition.

The contention in regard to the maintainability of this petition at Lucknow was founded on the provisions of clause 14, first proviso, of the United Provinces High Courts (Amalgamation) Order, 1948.

Clause 14 is in these words :

"The new High Court, and the Judges and division courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint : •

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice, otherwise directs, such judges of the new High Court, not less than two in number, as the Chief Justice may, from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court."



The argument that was raised before us was that the case, in respect of which this petition has been filed, arose in Allahabad because the Excise Commissioner (respondent no. 2 to this petition) had his office permanently at Allahabad and further because he had made the order which was sought to be quashed at Allahabad. There is gainsaying the fact that the second respondent has his place of business at Allahabad and further that the order which is sought to be quashed by a writ of *certiorari* was made at Allahabad. It is further not disputed that the order of respondent no. 2, which is sought to be quashed, is maintained on a record which is held by him at Allahabad. It was contended by Mr. *Uma Shankar Srivastava* that since a writ of *certiorari* operates on the record and since the record is at Allahabad, which according to his further contention was beyond the territorial jurisdiction of the Lucknow Bench, this Bench could not make an order for quashing the order of respondent no. 2.

On behalf of the petitioners it was contended that the proviso to clause 14 of the United Provinces High Courts (Amalgamation) Order, 1948, did not restrict the jurisdiction of the Lucknow Bench in every aspect of it. What was restricted, it was submitted, was the power to hear or entertain cases. It was pointed out that a Judge sitting at the Lucknow Bench was a Judge of the new High Court and as such he had "all the jurisdiction and power" that for the time being were vested in the High Court. Indeed, it was said that this was specifically so stated in the proviso itself. Mr. *Niamatullah*, on behalf of the petitioners, contended that the Lucknow Bench was to exercise jurisdiction in respect of cases arising in a certain area which was indicated in the proviso.

Whether the Lucknow Bench could exercise jurisdiction and make an order in respect of the present petition

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1959 or not was, in our opinion, depended upon the  
BALDEO RAM meaning of the words "exercise in respect of cases arising  
v. in such areas in Oudh." The word 'case' is not co-  
THE DEPUTY extensive in meaning with the word 'suit', 'appeal' or  
COMMISSIONER, 'proceeding'. The word 'case' may have a wider conno-  
GONDA tation than either a 'suit', an 'appeal' or a 'proceed-  
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than these three, for the connotation of the word  
'case' would depend, in any particular cause on the  
particular circumstances of that cause and no general  
rule of definition can, in our opinion, be laid down by  
which one could test whether a particular matter was a  
'case' or not. But on the scope and meaning of the  
word 'case' does not depend the answer to the problem  
facing us, for the word or real significance was the word  
'arising', and on the true interpretation of this word  
depended, in our view, the key to the answer. The  
word 'arise', among other meanings, has the meaning  
"to spring up; to spring forth from its source; to take  
its rise, originate". The word 'arising' has no special  
or technical meaning attached to it in forensic language.  
Therefore, it has to be interpreted in accordance with  
its common dictionary meaning and we have quoted the  
dictionary meaning as given in the Shorter Oxford  
English Dictionary, Volume I. If we accept that mean-  
ing, as we have to, then the phrase 'cases arising' must  
relate to the origin of a case, that is, these words must  
refer to the place or area of origin of the dispute.

The question which now calls for an answer is, where  
did the case out of which these proceedings originate  
or 'arise'. We know that Gonda was the place of origin  
of the case which culminated at Allahabad. So that,  
Gonda was the place of its origin and Allahabad its place  
of culmination. We do not think it could be legiti-  
mately argued that, bearing in mind the connotation  
of the word 'case', the matter which was being agitated

arose at Allahabad; nothing arose at Allahabad; something came up to Allahabad for decision. As we have already said above, Allahabad was the place of culmination, the place of origin was Gonda.

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The next matter which needs determination is, whether having in view the rule that a writ of *certiorari* operates on the record and since the record was at Allahabad, the Lucknow Bench could issue a writ quashing the order borne on that record. The Lucknow Bench possesses all the plenary powers of the new High Court. The powers which are exercised by Judges sitting at Lucknow are those which are vested in the Judges of the Allahabad High Court: there is no restriction on those powers. What is, so to speak, restricted by the provisions of the proviso of clause 14 is the territory from where a cause has arisen in respect of which such powers could be exercised. If Judges sitting at Allahabad could issue a writ of *certiorari* to quash the order of the Excise Commissioner, then the same order could be passed by Judges of the Lucknow Bench provided the origin of the cause in respect of which the order was to be made arose or originated within an area from where cases could be filed at Lucknow.

Reverting now to the merits of this petition, the sale by which the petitioner obtained the right to run the two liquor shops was set aside, as we have noticed earlier, by the order of the Excise Commissioner dated the 15th of November, 1958. The order aforementioned of the Excise Commissioner was made by him on an appeal which Jagat Narain and Patandin had filed before him. The main ground on which the Excise Commissioner appears to have set aside the sale was that a sale of two shops situate in two different localities, though of the same town, had been made by a sort of joint auction and yet the licence fee fetched by that

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auction had been more or less arbitrarily apportioned: the appellate order puts the matter in these words:

"It is not understood how the auction fee of each of the shops was determined separately when the bid was one, viz. Rs.49,294. The fixation of the auction fee for each of the shops appears to be arbitrary and since the shops had been held by two different individuals the arbitrary fixation thus operates against them and is also likely to create practical difficulties in the realization of deficit money from each of the licensees though they happen to be the same under the reauction."

The petitioner before us says he was adversely affected by this order of the Excise Commissioner setting aside the aforementioned sale because he happened to have been the licensee under the resale which had been set aside by the Excise Commissioner. The petitioner further contended that as a person interested he should have had notice of the appeal which had been filed by the respondents to the Excise Commissioner. Learned counsel contended that there was a failure of natural justice in this case inasmuch as the requirements of notice which was one of the requirements of natural justice had not been complied with in this particular case. Under the Excise Act by section 11 a right of appeal is given against all orders passed by the Collector under the Excise Act. These appeals are, of course, subject to rules which are framed by the Local Government under the Act. Further, a right of revision was vested in the Local Government against any order made by the Collector or by the Excise Commissioner. Chapter II, section 13 of the Excise Manual contains the rules regarding appeals and revisions. Under rule 126 an appeal lies to the Excise Commissioner from—

(a) an order of a Collector, and

(b) from a decision of a Licensing Board except where it is laid down in the Excise Manual that such decision of a Licensing Board is non-appealable.

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Under rule 130 any person aggrieved by an order of the Excise Commissioner or of the Collector or a decision of a Licensing Board may petition to the State Government for revision of the same. The petition for revision is to be received by the State Government if presented through the Collector and the Excise Commissioner within six months from the date of the order or decision, provided that no petition for revision of the order of a Collector or a decision of a Licensing Board would, as a rule, will be entertained by the State Government unless an appeal, where one lay, has been made and disposed of by the Excise Commissioner.

In this particular case it is clear that there was an appeal to the Commissioner and the appeal had been disposed of by the Commissioner, so that the petitioner if he was aggrieved by the order of the Commissioner made on appeal, could have applied to the State Government for a revision of the order made by the Excise Commissioner in appeal. That means that the petitioner clearly had another remedy an equally efficacious one, open to him.

In regard to the petitioner's contention that he had no notice of the appeal and that an order which prejudicially affected him had been made out without notice to him it has to be observed that no rules had been prescribed which made it obligatory for the Excise Commissioner to give any notice to a party interested in the subject-matter of the appeal, or that the Excise Commissioner was in any way bound to hear a party before he made an order on the appeal. In making his order the Excise Commissioner acted only, at best, in a

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quasi-judicial manner. In certain spheres his actin was purely administrative, but in certain other spheres however, the action that he took or the order that he made partook of the nature of a judicial order. In the instant case the order that the Excise Commissioner made was an order which was made to avoid what he calls practical difficulties. As was pointed out by their Lordships of the Supreme Court in *Nagendra Nath v. Commissioner of Hills Division* (1) at the page 409 that—

“the question whether or not any rules of natural justice had been contravened, should be decided not under any preconceived notions, but in the light of the statutory rules and provisions. In the instant case, no such rules have been brought to our notice, which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent tribunal, is no ground for interference either under Article 226 or Article 227 of the Constitution.”

In the case before us, as we have already pointed out, no rules have been brought to our notice which could be said to have been contravened by the Appellate Authority. As we have said, the basis of the order of the Appellate Authority was administrative convenience. We cannot, therefore, say that in this particular case there has been a violation of any rule of natural justice in regard to notice,

Learned counsel for the petitioner attacked the order of the Excise Commissioner on the ground that the order had been made by him on an appeal which had been filed before him beyond time. The affidavit accompanying the petition does not make any averment on which we could say that the statement of fact of

(1) A.I.R. 1958 S.C. 398.

learned counsel was supported: this was further, not a ground taken in the grounds on which the petition was founded. Learned counsel said that he did not have sufficient opportunity at the time when he filed this petition to set out all the grounds on which he could attack the order of the Excise Commissioner; that may have been so then, but since that time learned counsel has had sufficient opportunity to have his petition amended and add such other or further grounds that appeared to him to support his ultimate objective; we do not therefore, think that we can take this new ground into account at this stage when the other side has had no opportunity of meeting it. We accordingly have ruled this submission of the learned counsel out of account.

On what we have stated above we reject the preliminary objection and hold that the petition is entertainable. On the merits we hold that the petition should be rejected (1) on the ground that the petitioner had another equally efficacious remedy open to him and (2) because nothing has been shown on which we could say that there was any error apparent on the face of the record or that there was any failure of natural justice in this case. We accordingly dismiss this petition with costs.

*Petition dismissed.*

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## CRIMINAL REVISION

Before Mr. Justice Srivastava and Mr. Justice Verma.

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Possession or control of arms without licence—*Prosecution for, in certain areas—Want of previous sanction—Validity of prosecution—Indian Arms Act, 1878, ss. 19(f) and 29—Indian Areas Act, 1860, s. 32(2)—Constitution of India, 1950, Arts. 13 and 14.*

So much of s. 29 of the Indian Arms Act as authorizes the prosecution for the offence under s. 19(f) of that Act without the previous sanction of the District Magistrate, if the offence is committed within the area to which s. 32(2) of the Indian Areas Act applies as distinguished from the rest where such sanction is necessary, transgresses the constitutional guarantee of 'equality' before the law and, to that extent, became void after the coming into force of the Constitution.

*Jai Prakash v. State* (1) over-ruled.

Criminal Revision no. 1859 of 1958, (connected with appeal no. 1174 of 1956) from an order of H. G. SHUKLA, Additional Sessions Judge of Saharanpur, dated the 26th August, 1958 in Criminal Appeal no. 372 of 1957.

The facts appear in the judgment.

*Shambhu Prasad*, for the applicant.

The Advocate-General (*K. L. Misra*), for the State.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—We have before us an application in revision on behalf of MEHARCHAND and a reference made by OAK, J. in an appeal on behalf of the Sarupa.

The applicant Meharchand was convicted by the Railway Magistrate of Saharanpur under section 19(f) of the Indian Arms Act and was sentenced to undergo

(1) Criminal Revision no. 942 of 1954, decided on 5th July, 1954.



rigorous imprisonment for six months. It was found against him that on the 26th January, 1956 at about 1.30 p.m. while he was at Platform no. 5 of the railway station at Saharanpur he had in his possession a loaded country made pistol and four 12 bore live cartridges for which he did not possess any licence. As the offence had been committed in the district of Saharanpur no sanction was obtained for his prosecution as required by section 29 of the Indian Arms Act. Against his conviction the applicant went up in appeal to the Sessions Judge but the findings recorded by the Magistrate against him were confirmed and his conviction and sentence were both upheld.

The appellant in the other cases, Sarupa, has also been convicted under section 19(f) of the Arms Act by the Sessions Judge of Bijnor. It has been found against him that in the night between the 26th and 27th October, 1955 Sarupa was found in the possession of an unlicensed gun along with three live cartridges in respect of which he had no licence.

When the appeal of Sarupa came up before Mr. Justice OAK it was contended that his conviction stood vitiated because no sanction had been obtained for his prosecution from the District Magistrate. The learned counsel for the State, however, relied on section 29 of the Indian Arms Act and contended that no sanction was necessary in the case of Sarupa because he had committed the offence in the district of Bijnor which was situated north of the river Ganges. Mr. Justice OAK was of opinion that section 29 of the Indian Arms Act, though it may have been valid before 1950, had become void after the coming into force of the Constitution. A decision of Mr. Justice DAYAL in *Jai Prakash v. State* (1) was, however, cited before him in which an opinion had been expressed that section 29 of the Arms Act

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(1) Criminal Revision No. 947 of 1954, decided on 5th July, 1954.

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did not contravene Article 14 of the Constitution. Mr. Justice OAK felt it desirable that the question should be considered by a Division Bench. He therefore referred the following question for being decided by a Division Bench:

"Whether that part of section 29, Indian Arms Act, which does not extend the protection of the section to certain parts of Uttar Pradesh is void under Article 13 read with Article 14 of the Constitution?"

This very point has been raised by the learned counsel for Meharchand in his application for revision. He too contends that the conviction of Meharchand is bad because in his case too sanction was not obtained from the District Magistrate and meets the State's contention that no sanction was necessary in view of the provisions of section 29 of the Indian Arms Act by urging that that provision being discriminatory is constitutionally invalid.

Section 29 of the Indian Arms Act reads as follows:

"Where an offence punishable under section 19, clause (f), has been committed within three months from the date on which this Act comes into force in any province, district or place to which section 32, clause 2 of Act XXXI of 1860 applies at such date, or where such an offence has been committed in any part of British India not being such a district, province or place no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or, in a presidency town, of the Commissioner of Police."

Under this section the necessity for obtaining a sanction for the prosecution of a person under section 19(f) of the Arms Act depends on whether section 32, clause 2, of Act XXXI of 1860 was in force at the place where

the offence was committed in the year, 1878 when the Indian Arms Act was enacted. If the offence is committed in an area where section 32, clause 2, of Act XXXI of 1860 was in force in the year, 1878 sanction was required only during the first three months after the coming into force of the Arms Act. No sanction was required in respect of offences committed in that area after the expiry of the period of three months. If, however, section 32, clause 2 of Act XXXI of 1860 was not in force in that area in 1878 for offences committed under section 19(f) of the Arms Act in that area no prosecution could be launched at any time without the sanction of the Magistrate of the district. As was pointed out by DANIELS, J. in *Amir Ahmad v. Emperor* (1), clause 2 of section 32 of Act XXXI of 1860 was in force, (1) in every province, district or place which had been ordered to be disarmed, and (2) in every district, province or place where an order of general search for arms under Act XXVIII of 1857 had been issued and was still in operation. By a notification no. 5336, dated the 21st December, 1858 sections 1, 2 and 5 of Act XXVIII of 1857 had been extended to the whole of the then North-Western Provinces and a general search and seizure of arms had been authorized in these parts of the province which lay to the north of the rivers Jamuna and Ganges. As a result, in the areas that were formerly parts of the North-Western Provinces and in the area situated on the north of the rivers Jamuna and Ganges sanction for the prosecution for an offence under section 19(f) of the Arms Act was needed only during the first three months after the coming into operation of the Indian Arms Act. In the remaining part of the country, e.g. the area situated south of the Jamuna no prosecution could be started for that offence at any time without obtaining previous sanction. The curious consequence which follows is that if a person

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commits an offence under section 19(f) of the Arms Act, say in the district of Allahabad in an area south of the river Jamuna, he cannot be prosecuted without previous sanction of the District Magistrate but if the person commits the same offence in an area north of the Jamuna no sanction will be required for starting his prosecution. It is urged on behalf of the applicant that previous sanction is a sort of protection against indiscriminate and unjustified prosecution and consequent harassment. That protection is available to all persons in the country except those unfortunate ones who happen to commit the offence in a particular part of the country mentioned in section 29. The exception, it is argued, amounts to unjustified discrimination against the persons belonging to the excepted area. It is stressed that Article 14 of the Constitution guarantees equality before the law to every person throughout the territory of India and expressly provides:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is urged that if section 29 of the Indian Arms Act is discriminatory, as it appears to be, after the coming into force of the Constitution it became void under Art. 13 because it came into conflict with Article 14 of the Constitution. It is therefore not open to the State to rely on that provision in support of the contention that sanction for the prosecution of Meharchand and Sarupa under section 19(f) of the Indian Arms Act was not required because the offences were committed by them in an area north of the river Ganges.

Article 14 of the Constitution has been the subject-matter of consideration by the Supreme Court in a number of cases. It does not appear to be necessary to refer to the numerous cases because very recently the views of that Court on the subject have been summarised in the

case of *Ram Krishna Dalmia v. Justice Tendolkar* (1) in the following manner :

"In *Budhan Choudhry v. The State of Bihar* (2) a Constitution Bench of seven Judges of this Court explained the true meaning and scope of Article 14 as follows :

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"The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chiranjit Lal v. Union of India* (3), *State of Bombay v. F. N. Balsara* (4), *State of West Bengal v. Anwar Ali Sarkar* (5), *Kathi Raning Rawat v. State of Saurashtra* (6), *Lachmandas Kewabhai v. State of Bombay* (7), *Qasim Razvi v. State of Hyderabad* (8) and *Habeeb Mohammad v. State of Hyderabad* (9). It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to

(1) A.I.R. 1958 S.C. 538.

(2) A.I.R. 1951 S.C. 41.

(3) A.I.R. 1952 S.C. 71.

(4) A.I.R. 1952 S.C. 235.

(5) A.I.R. 1955 S.C. 101, 105.

(6) A.I.R. 1951 S.C. 318.

(7) A.I.R. 1952 S.C. 325.

(8) A.I.R. 1953 S.C. 370.

(9) A.I.R. 1953 S.C. 287.

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objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself ;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(d) that the Legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

It is in the light of these principles that the question whether any part of section 29 of the Indian Arms Act is hit by Article 14 of the Constitution has to be decided.

As has been pointed out already, section 29 divides persons who may commit an offence under section 19(f) of the Arms Act in two distinct classes: (1) persons who commit the offence within that area of the country in which section 32, clause 2, of Act XXXI of 1860 was in force at the time when the Indian Arms Act came into force and (2) persons committing the same kind of offence in the rest of the country. In the case of the persons falling under the former class the protection of previous sanction for prosecution was given only for the first three months after the coming into force of the Arms Act and was not to be available after the expiry of that period. In respect of the offenders falling in the latter class the protection was to be available at all times without any limitation. It is, therefore, obvious that among the offenders of the same kind one rule of law is to apply

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to some and another rule of law is to apply to others, the basis of the distinction being a geographical one, namely the place where the offence was committed.

As was observed by the Supreme Court in *Budhan Choudhry v. State of Bihar* (1) Article 14 does not forbid classification absolutely. It permits classification by legislation provided two tests are answered: (1) That the classification is founded on an intelligible differentia and (2) that the differentia has a rational relation to the object sought to be achieved by the statute in question. It may be conceded at once that a geographical or territorial basis is an intelligible differentia which may distinguish one class of persons from another. The Supreme Court expressly stated in *Budhan Choudhry's* case (1):

"The classification may be founded on different bases namely geographical or according to objects or occupation or the like."

That, however, is not enough. The other test also must be satisfied and it must be shown that this geographical or territorial basis has some connection with the object of the enactment. The object of the Indian Arms Act as its preamble shows, was to consolidate and amend the law relating to arms and ammunition stores. Section 19(f) of the Arms Act was enacted to punish persons who had in their possession and control any arms, ammunition or Military stores in contravention of the provisions of section 14 or 15 of the Act. The object of section 29 appears to have been the prevention of indiscriminate prosecution for offences punishable under section 19(f) of the Act. Prior sanction was made necessary to protect persons from unnecessary harassment. That being the object of the Act some nexus has to be discovered between the classification on territorial basis and the object of the Act. The presumption of consti-

(1) A.I.R. 1955 S.C. 191.



tutionality is certainly there and it can also be presumed that the Legislature when it enacted the provision had some justification for making the distinction because the conditions in one part of the country were more disturbed than in the other. The same reasons which led to the disarming and a general order of search of arms in one part of the country may have at that time justified the withholding of the protection of prior sanction for the offender committing offence in that part of the country. But now more than three-quarters of a century have elapsed since then and have brought about a definite change for the better. At least for several decades the conditions so far as law and order is concerned have been almost identical in the whole State and it cannot even be suggested that the situation in the area south of the river Jamuna has in any manner been different from that in the area on the north of the river. The question, therefore, is whether in the year 1956 there was any justification left for maintaining the discrimination to be found in section 29 and whether any connection can be found to be existing at that time between the object of the enactment and the classification made in it. We failed to discover any. The learned counsel for the State also expressed his inability to point out any such connection. An opportunity was given to the State to furnish any materials on the basis of which such a connection could be held to exist. No such materials were, however, furnished. The learned counsel for the State as well as the learned Advocate General, who very kindly agreed to assist us in this matter, both fairly conceded that, at least, at present there was no nexus between the basis of the classification and the object of the Act. If a person committing the offence south of the river Jamuna was entitled to the protection of a prior sanction they could not suggest any reason at least at present why a person committing the same offence

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on the north of the river should not be entitled to the same protection. It was thus practically conceded that the classification envisaged in section 29 cannot now be held to be justified on any reasonable basis, and the person to whom the section denied the protection of previous sanction could, therefore, contend with justification that he was being discriminated against and that the equality of law guaranteed by Article 14 of the Constitution was being denied to him.

It was, however, urged that if the enactment was valid and good at the time when it was made it cannot be held to be invalid now. This contention does not appear to be correct. The Constitution clearly provides that after it has come into force all previous laws which are found to be in conflict with the provisions of Part III of the Constitution which includes Article 14, shall become void to the extent of such inconsistency. So even if the provision was valid when it was enacted, if it is in contravention of Article 14 now, it must be struck down.

A reference to the law reports will disclose many instances of laws which were valid when enacted but became void after 1950 as they were found to be in conflict with some fundamental right guaranteed by the Constitution.

In the case of *Manohar Singhji v. State of Rajasthan* (1) Manohar Singhji was the Jagirdar of Bedla situated in the former State of Mewar. That State was integrated with some other states in 1948 to form what was known as the United States of Rajasthan. Certain ordinances in connection with the management of *jagirdari* property were enacted by that State of Rajasthan. Subsequently there was a further integration of the former United States of Rajasthan with the former states of Bikaner, Jaipur, Jaisalmer and Jodhpur and a new

(1) A.I.R. 1953 Raj. 22.

United States of Rajasthan was formed. The result was that the ordinances in accordance with which the *jagirdari* of the petitioner was being managed remained applicable to a part of the newly formed State of Rajasthan but were not in force in the rest of it. The ordinances were, therefore, challenged on the ground that they had become void after the coming into force of the Constitution as Art. 14 was contravened. The contention was upheld and the decision of the Division Bench of the Rajasthan Court was confirmed by the Supreme Court in *State of Rajasthan v. Rao Manohar Singhji* (1).

The case of *Shiv Kalyan Singh v. Bhur Singh* (2) is another instance of a law which was valid at the time of its enactment but became void after the coming into force of the Constitution because it was found to be in conflict with the guarantee of equality of laws. In that case certain rules framed in 1945 and were applicable only to the State of Jaipur. After Jaipur State integrated with the other States, and the United States of Rajasthan was formed, the validity of the rules was challenged on the ground that special legislation could apply to a particular geographical area only if there was some basis for singling out that area for the application of that legislation. As there was no such basis to justify the application of the rules to a part of the State only, it was held that the rules were hit by Art. 14 and were therefore *ultra vires*.

The principle that a law was valid when passed can become invalid on account of subsequent events was also recognized in the case of *Chastleton Corporation v. A. Leftwich Sinclair* (3). Where HOLMES, J. declared:

“And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events.

(1) A.I.R. 1954 Raj. 297.

(2) A.I.R. 1954 Raj. 182.

(3) 68 L. Ed. 841.

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A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."

It is therefore not correct to say that because the provision was not invalid at the time when it was enacted it cannot be challenged now. After the enforcement of the Constitution every piece of earlier legislation must be tested on the touch stone of Part III of it, and can survive only if it is not found to be in conflict with any of the Articles of that part. Article 13 clearly makes it void to the extent of the inconsistency, if any.

An argument which found favour with DAYAL, J. in *Jai Prakash v. State* (1) was also advanced on behalf of the State. It was urged that the only thing which Section 29 does is to lay down that one rule shall operate in one part of the country and another shall apply to the rest of it.

No discrimination is made, it is pointed out, between one person and another. Whoever may be the person if he commits the offence in a particular territory he can be prosecuted without previous sanction. Similarly all persons committing the offence in the other part can be prosecuted without previous sanction. Similarly all Article 14, it is contended, prohibits discrimination between one person and another. It does not provide that different areas in the country cannot have different laws. This argument of the learned counsel for the State does not appear to be sound and the Advocate General very fairly conceded that he was unable to endorse it. While it puts undue emphasis on the words "any person" used in Art. 14 it ignores altogether its concluding words "within the territory of India". The argument overlooks another important aspect of the matter. Legislation for an area essentially means legis-

(1) Criminal Revision no. 942 of 1954, decided on 5th July, 1954.

lation for the people of the area. Laws have to be obeyed or disobeyed. That can be done only by persons and not by territories. For the purpose of Art. 14 therefore one cannot think of territories apart from the persons who belong to them. It is consequently not possible to say that though discrimination has been made between territories, it has not been made between persons.

It is true that Art. 14 does not require that all laws must be of universal application. Conditions and circumstances differ from area to area and the Legislature has to legislate keeping all of them in mind. Laws can, therefore, from the very nature of things, differ in respect of different territories. That is why classification on geographical or territorial basis is permissible. Such classification must however answer the test of having a reasonable connection with the object of the legislation, and if that is absent, the classification becomes unjustified discrimination and vitiates the legislation. In that case it cannot be upheld on the ground that discrimination has been made between territories only and not between persons.

The discrimination made in section 29 of the Arms Act between two classes of offenders therefore contravenes Article 14 of the Constitution. The protection of prior sanction, if it was to be available at all, must have been available, at least after the coming into force of the Constitution to all persons without any distinction on territorial basis. That part of section 29 therefore which debars one part of the State from claiming the advantage must consequently be held to have become void after the enforcement of the Constitution under Art. 13 of it.

Irrespective of the area in which Meharchand and Sarupa committed the offences which they were alleged to have committed, they could not have been prosecuted without prior sanction being taken, and if no sanction

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was obtained in their cases their prosecution stood vitiated.

We therefore agree with the view taken by OAK, J. in his order of reference and answer the question referred to us by him in the affirmative. The record of the appeal of Sarupa will now be sent back to him with this answer. The application in revision on behalf of Meharchand is allowed. His conviction and sentence are set aside. He is on bail. He need not surrender. His bail bonds shall stand cancelled.

*Application allowed.*

### CRIMINAL REVISION

*Before Mr. Justice Mulla and Mr. Justice Nigam\**

JAMUNA PRASAD

v.

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6961  
February 25.

**Criminal Trial**—Charge under s. 186, Indian Penal Code, 1860—Report by a public servant at the police station—Criminal Procedure Code, 1898, 4(1) (h), Complaint, applicability of—Criminal Procedure Code, 1898, s. 195 (1) (a), scope of.

A. H. Chishti, the Sales Tax Officer, Lucknow, was inspecting the shop of Ahmad Hasan Waheed Hasan, Udaiganj, Cantonment Road, Lucknow on the 19th October, 1956 when Jamuna Prasad, the accused, came there and interfered in the discharge of his official duties as a public servant and also misbehaved. Sri Chishti immediately lodged a report of this incident at the police station. The police thereupon, submitted a charge-sheet against the accused under s. 186, Criminal Procedure Code. Sri Chishti, appeared as a prosecution witness in this case and he proved the report. The accused was convicted under s. 186, Indian Penal Code. A revision was filed against this order.

*Held*, (i) that the report lodged Sri Chishti cannot be construed as a complaint under s. 4(1) (h), Criminal Procedure Code.

\*Sitting at Lucknow.

(ii) that the requirements of s. 195 are (a) that the accusation should be made to the Magistrate.

(b) This accusation should be made with a view to his taking action under the Code.

(iii) that the restrictions imposed by s. 195, Criminal Procedure Code are not a mere technicality but they are imperative and a disregard of these provisions vitiates the whole proceedings which are not cured by the provisions of s. 537, Criminal Procedure Code. A Magistrate has no jurisdiction to proceed on the mere report of the police officer.

Case-law discussed.

Criminal Revision No. 30 of 1957 from an order of A. P. Srivastava, Sessions Judge, Lucknow, dated 20th November, 1958.

The facts appear in the judgment.

*Gopi Krishna*, for the applicant.

The Additional Government Advocate (D. P. Uniyal) for the State.

The judgment of the Court was delivered by—

MULLA, J.:—Jamuna Prasad applicant was convicted under section 186, Indian Penal Code and sentenced to pay a fine of Rs.50 in default simple imprisonment for a fortnight by a first class Magistrate, Lucknow. He went up in appeal, but the Sessions Judge, Lucknow, upheld the order of the Magistrate and dismissed his appeal. It was contended by the counsel for the applicant that the Magistrate had no jurisdiction to take cognizance of the offence committed by the applicant as there was no proper complaint required by section 195(1)(a) of the Criminal Procedure Code and the whole trial was vitiated because of this illegality, but this contention was rejected by the appellate court. A few decisions were cited by the counsel for the applicant before the appellate court which supported this contention, but the view expressed by a Single Judge of this Court in *Barkat v. Emperor* (1) was preferred by the appellate court and accepting that view it rejected the appeal.

(1) A.I.R. 1943 All. 6.

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The applicant then came up in revision before this Court and the revision came before one of us who found that there was overwhelming authority in support of the contention advanced by the applicant and there were also a few authorities against that contention. The revision was, therefore, referred to a Divisional Bench of this Court so that an authoritative decision may be given on the point involved. It is in these circumstances that this case has been placed before a Bench of this Court.

Before dealing with the point of law involved in the case it would be desirable to give briefly the facts of this case. The prosecution case is that Sri A. H. Chishti, Sales Tax Officer, Lucknow, was inspecting the shop of Ahmad Hasan Wahid Hasan, Udaiganj, Cantonment Road, Lucknow, on the 19th of June, 1956, when the applicant came there and interfered in the discharge of his official duties as a public servant and also misbehaved. Sri Chishti immediately afterwards lodged a report of this incident at the police station concerned. The police thereupon submitted a charge-sheet against the applicant under section 186, Indian Penal Code. Sri Chishti appeared as a prosecution witness in this case and he proved the report which he had lodged.

The question to be decided in the case is whether the report lodged by Sri Chishti at the police station with a view that some action should be taken against the applicant fulfils the requirements of section 195 (1) (a) of the Code of Criminal Procedure or not. We think it desirable to quote section 195 (1) (a) at this stage. It runs as follows:

"No Court shall take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."



The words quoted above are unambiguous and they make it imperative that a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate should be filed. The question, therefore, arises whether the report lodged by Sri Chishti can be construed as complaint. Complaint has been defined in section 4(1) (h) of the Criminal Procedure Code. The definition is as follows:

“‘Complaint’ means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer.”

It cannot be doubted that the word ‘complaint’ used in section 195, Criminal Procedure Code is limited by the definition which we have cited above. There are two requirements which must be fulfilled before an accusation can be called a complaint. These requirements are—

(a) that the accusation should be made to a Magistrate, and

(b) this accusation should be made with a view to his taking action under the Code.

A further requirement is laid down by section 195, Criminal Procedure Code, namely that this accusation should be in the writing of the public servant himself or of some other public servant to whom he is subordinate. As these three requirements are conditions precedent which must exist before the complaint can be entertained, we have to see whether the report of Sri Chishti fulfils these requirements.

Admittedly this accusation was not made to a Magistrate either orally or in writing, but it was made at the police station. Again this accusation was lodged not with a view that the Magistrate should take any action against the applicant, but that the police should take

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action against the applicant. The report was a scribed report, but as it was not presented to the Magistrate but at the police station it cannot be described as a complaint in writing. We, therefore, find that none of the three requirements of law were fulfilled. On a plain reading of section 195(1) (a) and the definition of the word 'complaint' given in section 4(1) (h) of the Criminal Procedure Code, we could have easily decided the question before us, but as there are conflicting views taken by the Judges of the various High Courts in interpreting the word 'complaint' it is necessary to examine this question in detail.

Before entering into this conflict of authority, we would like to observe how in our opinion the words of the statute should be interpreted. Where the words provide a clear and unambiguous meaning, the courts of law are not entitled to read something more in those words than what is contained in them. The legislature speaks through the statute and the courts have to carry out the directions given in the statute so long as the directions are clear and distinct. It is only where the language of the statute is capable of more than one meaning that the courts of law can seek their guidance from the intention of the legislature or the principles of equity. The definition of 'complaint' is neither ambiguous nor does the plain meaning of its words in any way militate against the intention of the legislature. In our opinion, therefore, it is not possible to travel beyond the express direction given by the words of this definition. Before an accusation can be termed a complaint, it must be addressed to a Magistrate with a view to his taking action. Any communication addressed to any one else except a Magistrate is, therefore, outside the definition of the word 'complaint' given in the Code of Criminal Procedure. The legislature as a matter of fact went out of its way to make its intention perfectly clear. It clearly stated in the definition of the word

'complaint' that it does not include the report of a police officer. What has been expressly excluded by the legislature cannot be included in the definition by courts of law. Where an aggrieved public servant lodges a report at the police station and the police in its turn submits a charge-sheet the proceedings before the Magistrate do not start on the report lodged by the public servant, but on the charge-sheet submitted by the police officer. In other words the proceedings in such a case start on the report of a police officer and this has been expressly excluded by the definition of the word 'complaint' cited above. That the ball was set rolling by the report lodged by the public servant is quite irrelevant to the question before us. The report of Sri Chishti was, therefore, merely an information given to the police and it was up to the police concerned to prosecute the applicant or not. The right to prosecute in cases which are covered by section 195(1) (a), Criminal Procedure Code is vested only in the public servant and it cannot be delegated. No one can represent the public servant or act on his behalf or be his substitute as a complainant.

A Magistrate can take cognizance only under section 190, Criminal Procedure Code under the following conditions as given in that section:

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed.

The words of (a) and (b) make it perfectly clear that a complaint is not the same thing as a report and the legislature clearly made a distinction between the two.

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The right to entertain a complaint is, however, restricted by the provisions of section 195, Criminal Procedure Code and a few following sections. The reason why this restriction has been placed can well be understood. The principle underlying section 195 Criminal Procedure Code is that where offences in contempt of lawful authority or against public justice are committed, then only the public servants or the courts concerned can initiate proceedings in the matter. This was to stop private persons from wreaking vengeance against such offenders. A discretion was, therefore, to be exercised by the public servants and the courts concerned before such prosecutions could be launched. Another reason why it was considered necessary to fetter the initiation of such criminal proceedings was that the offences which amount to contempt of lawful authority of public servants or which are committed against administration of public justice are of so many shades that a prosecution in respect of every such offence was not desirable. It was, therefore, considered necessary that the public servants should be given the discretion to prosecute such offenders or not. It was perhaps for these reasons that it was considered necessary that the public servant concerned should file a complaint in writing before a Magistrate. Such a written complaint would be a guarantee that the prosecution was well considered. We are, therefore, of the opinion that the restrictions imposed by section 195, Criminal Procedure Code are not a mere technicality, but there is a definite purpose behind these restrictions. In our opinion the legislature intended that the magistrate should take cognizance only when a formal complaint in writing was duly presented by the public servant or his superior and in no other case.

There are a large number of cases which support the view which we have expressed above. It would not be possible for us to refer to all these cases, but we

will mention a few of them. We will first take up the decisions of our own High Court. The first case which touches this point is *Baldeo Singh v. King Emperor* (1). In that case the Circle Inspector submitted a report to the Superintendent of Police praying that permission to prosecute the accused under section 195, Criminal Procedure Code be given. This prayer was made under a mistaken notion that sanction was necessary. Actually no such sanction was necessary. When this report came to the Superintendent of Police he forwarded it to a Magistrate with the endorsement that necessary action should be taken and it should be disposed off. DANIELS, J. held that the endorsement of the Superintendent of Police did not come within the definition of a complaint as it was not an allegation made to a Magistrate with a view to his taking action. In the case cited above it was the superior officer of the public servant who had made the endorsement and yet this endorsement was not considered equivalent to a complaint. This decision was approved by a Bench of our High Court in a subsequent decision. That case is *Lakhan v. Emperor* (2). A difference of opinion arose in this case between SULAIMAN, C. J. and BENNET, J. and the case was referred to RACHHPAL SINGH, J. who agreed with SULAIMAN, C. J. The view of the majority of the judges was that a report made to a police officer does not amount to a complaint. A similar view was expressed by DESAI, J. in *Sumer Goshain v. State* (3).

The only case of our High Court in which a contrary view was expressed is *Barkat v. Emperor* (4). ALLSOP, J. observed:

"In the first place, the term 'complaint' as defined in section 4(1) (h), Criminal Procedure Code, has the meaning therein given, unless a different intention appears from the subject or context. A

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(1) A.I.R. 1926 All. 566.  
(3) A.I.R. 1952 All. 560.

(2) A.I.R. 1936 All. 788.  
(4) A.I.R. 1943 All. 6.

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complaint, as defined, does not include the report of a police officer. It is obvious that the term 'complaint' in section 195(1) (a) cannot be used in that sense because otherwise, it would be possible for any person to obstruct a police officer in the execution of his duty without rendering himself liable to punishment under section 186, Penal Code. It seems to me that the intention of section 195, Criminal Procedure Code, is only that the Magistrate should not punish any person except at the instance of the public officer concerned or of his superior and I do not think that the term 'complaint' is used in the technical sense in which it is defined in section 4."

With respect to the learned judge, we would like to observe that we have not been able to follow his line of reasoning. We fail to see why a police officer, if such a situation arose, cannot file a written complaint to a Magistrate. We also find no adequate reason for the proposition that the word 'complaint' used in section 195(1) (a), has wider scope than the definition of 'complaint' given in section 4(1) (h) of the same Code. Where words are defined they are at least applicable to that statute in which they are defined and we find no justification for the view that the word 'complaint' used in section 195 (1) (a), Criminal Procedure Code was to be given another meaning than the meaning given to it in the Code itself.

The view expressed by ALLSOP, J. has been considered and dissented from in the following three cases:

*Lajja Ram v. The State* (1).

*Krishna Tukaram Jadhav v. The Secretary to the Chief Minister, Bombay State* (2).

A Division Bench decision in *Raghunath Rai v. State of Rajasthan* (3).

(1) A.I.R. 1952 H.P. 32.

(2) A.I.R. 1955 Bom. 315.

(3) A.I.R. 1958 Raj. 91.

Only one High Court followed the view taken by ALLSOP, J. in *State v. Nandlal Karunashanker* (1). A Bench of the Saurashtra High Court followed this view. No authorities in favour of their interpretation were cited either by the judges of the Saurashtra High Court or by ALLSOP, J. of the Allahabad High Court. The Saurashtra High Court, however, did not follow the above Division Bench ruling in another case, *State v. Kathi and Unad Ranning* (2). We would also mention that when ALLSOP, J. expressed this view, he did not take into consideration the contrary view which was held by the other judges of our High Court and he made no reference to the other earlier decisions which we have cited.

In the Bombay decision cited above *Krishna Tukaram Jadhav v. The Secretary to the Chief Minister Bombay State* (3). SHAH, J. observed at page 317:

—“A complaint in writing by the public servant concerned is a condition precedent to the cognizance being taken by a Magistrate of an offence mentioned in section 195(1) (a), Criminal Procedure Code and that condition must be strictly complied with. A complaint not by the public servant concerned or by some public servant to whom he is subordinate, but by person who is merely authorized in writing to file a complaint in his own name is not a good substitute for the requisite complaint so as to confer jurisdiction upon the Magistrate. Section 195, Criminal Procedure Code does not permit any delegation of authority by the public servant concerned.’

We are in full agreement with the view expressed above and it seems to us that if the Legislature contemplated that reports lodged by public servants could be treated as their complaints within the meaning of section 195 (1) (a), Criminal Procedure Code, the Legislature

(1) A.I.R. 1951 Sau. 8.

(2) A.I.R. 1955 Sau. 10.

(3) A.I.R. 1955 Bom. 315.

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would certainly have added the word 'report' also when it enacted this provision. We cannot read the words 'except on the complaint in writing of the public servant' as 'except on the complaint *or report* in writing of the public servant'.

We may now cite a few decisions of the other High Courts which have also expressed the same view which we have taken.

These decisions are:

*Ram Singh v. Emperor* (1).

*Banshilal Dukhiram v. State* (2).

*Makaradhwaj Sahu v. State* (3).

*Babu v. Emperor* (4).

The consensus of authority, therefore, is clearly against the view taken by ALLSOP, J. Apart from the cases cited by us, we have already observed that the words of the statute themselves are not capable of the interpretation put upon them by ALLSOP, J. Where the definition of the word 'complaint' clearly excludes the report of a police officer, it is implied that it also excludes the report to a police officer.

In view of what we have observed above, we find that the Magistrate had no jurisdiction to entertain this complaint. The provisions of section 195, Criminal Procedure Code are imperative and a disregard of these provisions vitiates the whole proceedings and cannot be cured by the provisions of section 537, Criminal Procedure Code.

We, therefore, allow the revision, set aside the conviction of the applicant and acquit him. The fine, if paid by him, should be refunded.

*Revision allowed.*

(1) (1935) 36 Cr. L. J. 714.  
(3) A.I.R. 1954 Ori. 175.

(2) (1954) Cr. L. J. 15.  
(4) A.I.R. 1940 Oudh 241.



## APPELLATE CIVIL

Before Mr. Justice Beg and Mr. Justice Tandon.\*

SHARAFAT ULLAH KHAN

(DEFENDANT).

v.

RAJA UDAIRAJ SINGH

(PLAINTIFF).

1959  
March 2

**Landlord and Tenant—Ejectment—Aereas of rent—United Provinces (Temporary) Control of Rent and Eviction Act, 1947, s. 3(1) (a) as amended by Act of 1954 scope of.**

*Held*, that the (1954) amendment of clause (a) of s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 did not affect the maintainability of suits for eviction filed prior to the amendment, if at the time they were instituted the necessary condition then required by cl. (a) of s. 3 was fulfilled and it cannot be held that the amendment in cl. (a) of sub-s. (1) of s. 3 by the Act of 1954 was retrospective in operation or required pending suits to be decided in accordance therewith.

*Garikapti Veeraya v. Subbiah Choudhry* (1), *Ram Saran v. Lala Bir sen* (2) relied on.

*Raja Ram v. Madho Prasad* (3) distinguished.

Second Appeal No. 168 of 1951 against the decree of DESH DIPAK, Civil Judge of Lucknow, dated 3rd May, 1951.

The facts appear in the judgment.

*Niamatullah, Mohd. Hakimuddin, Mohd. Halimuddin and Inayatullah*, for the appellant.

*B. K. Dhaon* for the respondent.

The judgment of the Court was delivered by—

TANDON, J.:—These are three appeals in which a common question of law as to the effect of the U. P. (Temporary) Control of Rent and Eviction (Amendment) Act, 1954, arises. Appeals nos. 168 of 51 and 321 of 53 have been referred to a Division Bench by a learned Single Judge of this Court, as an important question of law, about which there was some conflict also was raised. In Special Appeal No. 1 of 56 also the

\*Sitting at Lucknow.  
(2) 1958 A.W.R. 62.

(1) A.I.R. 1957 S. C. 540.  
(3) 1954 A.L.J. 195.

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same question is involved. All the three appeals have accordingly been heard together. In order to appreciate the points in controversy the following short history of the U. P. Control of Rent and Eviction Act, 1947 may be necessary. This Act was first enacted in 1947 and was by virtue of sub-section (3) of section 1 thereof given effect to on and from the 1st day of October, 1946. Section 3 of the Act placed restriction on the right of a landlord to file a suit for eviction of a tenant from any accommodation in these terms:

"No suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation, except on one or more of the following grounds:

(a) that the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him a notice of demand from the landlord ;

(b) . . . . ."

The above provision continued in that form in the Act until 30th September, 1954, when it was amended by the Uttar Pradesh Temporary Control of Rent and Eviction (Amendment) Act, 1954. In its amended form clause (a) read as follows:

"(a) That the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of a notice of demand."

The amending Act of 1954, further provided in sub-section (2) of section 1 that it shall come into force with effect from 30th September, 1954. An express provision was thus made in this Act of 1954, that it shall come into force with effect from 30th September, 1954.

From a comparison of the old and the new version

of clause (a) referred to above it would appeal that originally the provision in it was in respect of "any arrear of rent" as distinguished from the new provision, according to which the arrear had to be for more than three months. The rest of the provisions remained more or less the same at least in this respect that the liability of the tenant continued to rest on his failure to pay the arrears within one month of the service upon him of the notice of demand.

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The three suits of which the three appeals have arisen were admittedly instituted prior to 1st October, 1954, when the amending Act of 1954, came into force. In the case of Second Appeal No. 168 of 51 the suit was commenced in 1949 and there was at the time of the institution of the suit an arrear of rent due from the tenant for three months only, that is, from 1st January, 1949 to 31st March, 1949. Besides the arrears amounting to Rs.225 the plaintiff also claimed Rs.75 as compensation for use and occupation of the accommodation during the month of April, 1949.

In the case of Second Appeal No. 321 of 53 two months' rent was in arrear at the time of the institution. Besides the allegation by the landlord also was that the defendant had caused damage to the accommodation for which he claimed a sum of Rs.200. This suit was commenced in 1951.

In the case of Special Appeal No. 1 of 56 the defendant occupied the accommodation in suit at a rent of Rs.6 per mensem and he was in arrears of rent from 1st May, 1951, to 31st July, 1951, that is, for three months when a notice was served upon him demanding the same. This suit, too, was instituted in 1951.

In the last mentioned case the trial Court dismissed the suit for ejectment but upheld the claim for arrears of rent. It, however, allowed deduction for alleged repairs done to the house by the tenant. On appeal

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the learned Civil Judge repelled the tenant's claim to deduct the amount of costs of repairs claimed from the arrears of rent. He, however, held that there was no wilful default in the payment of rent. On that finding he refused to give a decree for ejectment. On appeal a learned single Judge (C. B. AGARWALA, J.) disagreed with the learned Civil Judge on the ground that there was no wilful default in the payment of rent but he refused to give a decree for ejectment on the ground that since the institution of the suit the Amending Act of 1954, had come into force and according to the amended clause (a) existence of three months' arrears was necessary which was not the position in the case. Accordingly he held that a decree for ejectment could not be granted.

In the other two cases a decree for ejectment has been granted by the Court below on the finding that the defendant appellants were in arrears of rent at the time of the institution of the suit. It might have been noticed earlier also that the arrears of rent in these two cases also were not for a period of more than three months. The question, therefore, arose in them too how far the right of the plaintiff-landlord was effected by the Amending Act of 1954. The defendants-tenants claimed that since the arrears were not for a period of more than three months the above amendment in 1954 in clause (a) rendered the claim for ejectment liable to be rejected. In the suit to which appeal no. 321 of 53 relates the two courts below also held the defendant liable to eviction on the ground that he damaged the accommodation.

From the above description of facts in the three cases the common question of law arising in them is how far the amendment of clause (a) of section 3 of the Act made in 1954 affected the maintainability of suits for eviction filed prior to the amendment, if at the time

they were instituted the necessary condition then required by clause (a) was fulfilled.

Before the above question is considered it would be worthwhile to refer to the fact that the U. P. Control of Rent and Eviction Act was enacted to control the letting and rent of residential accommodation and to prevent the eviction of the tenants therefrom. Like similar provisions relating to letting and rent of residential accommodation, section 3 of the Act has placed a restriction on the right of a landlord to pursue his remedy of eviction by a suit without the permission of the District Magistrate, except on one or more of the grounds mentioned in clauses (a) to (g) of sub-section (1) of that section. The rights and liabilities of landlords and tenants therefore continued to be governed in matters other than those which had been provided for in the above act by the provisions of the Transfer of Property Act, or other law applicable to them. Since the purpose of the U. P. (Temporary) Control of Rent and Eviction Act is to control for a temporary period the eviction of tenants from any accommodation, section 3 has simply placed certain restrictions on the powers of the landlord, otherwise possessed by him in that respect, not to file a suit for eviction except with the permission of the District Magistrate envisaged by it. The power to evict a tenant has not been abrogated thereby, but a restriction or impediment has been imposed or created on the exercise of that power which in terms of the section can, except in the cases referred to in clauses (a) to (g) be exercised with the permission of the District Magistrate. A landlord is under the ordinary law, entitled to evict his tenant in accordance with the contract of tenancy or the provisions of the Transfer of Property Act. That right belongs to him apart from the provisions of the U. P. Control of Rent and Eviction Act, 1947. That right of his, however, has been controlled by section 3 of the Act. A suit for

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available to him under the ordinary law. The right of suit is thus a vested right which belongs to him. But as a result of section 3 certain restrictions have been imposed on the exercise of that right.

The learned counsel appearing for the tenant has suggested that while the right to evict a tenant may be said to be a vested right belonging to the landlord but a suit to enforce that right is not a vested right. He would describe it as a matter of procedure only, and the idea underlying this contention is that any change in the law taking place subsequently is retrospective where the provision which has been changed is procedural in nature. In this way he has asked us to hold that the Amending Act of 1954 by which clause (a) of sub-section (1) of section 3 was amended was retrospective.

The right of suit to enforce some other right belonging to a party is not a matter of procedure. It is indeed a very valuable and substantial right without the presence of which what may be called the other right of person will be rendered of no use or purpose. Without the remedy to enforce the right, the right itself becomes, if that expression may be used, truncated. The right of suit which is the legal pursuit of the remedy is in the circumstances itself a vested right.

In *Garikapati Veeraya v. N. Subbiah Choudhry* (1) the question arose before their Lordships of the Supreme Court whether the right of appeal was a mere matter of procedure or was it a substantive right. They held that:

"The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(1) A.I.R. 1957 S. C. 540.

The right of appeal is not a mere matter of procedure but is a substantive right."

Their Lordships further laid down that:

"The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the litigation commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

This case was concerned with the right of appeal but the question involved was with regard to the "legal pursuit of the remedy" which included both a suit and an appeal from the order passed in the suit. The right involved is the right to obtain the remedy which is obtainable by a suit, etc. The right of suit is thus a vested right and not a matter of procedure as the learned counsel has contended.

One other fact which will be of use in judging the controversy is that in every one of the three cases the suits had already been instituted long before the Amending Act, 1954, was enacted. Section 3 of the Parent Act placed no restriction on the right of suit for eviction where the tenant wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from him. By instituting the above suits on the ground that the tenants had wilfully failed to make payment of the arrears despite the notice given to them, the

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plaintiffs exercised that right of theirs. On the date these suits were instituted they were properly instituted suits and their maintainability could not be assailed on the ground that permission of the District Magistrate had not been obtained. The plaintiffs had the right on those dates to have the suits instituted by them and to be heard on merits, etc.

The effect of the amending Act of 1954, has now to be considered. Did it have the effect to amend retrospectively the provision in clause (a) of section 3(1) so as to require even in cases already instituted, the new condition contained in that clause to be fulfilled. As was pointed out earlier too sub-section (2) of section 1 of that Act made provision for its coming into force with effect from 30th September, 1954. There is no separate provision in section 4 either of that Act, by which clause (a) aforesaid was amended, to show that retrospective effect had been given to that particular amendment. Therefore, according to the express language of the enactment, this Act had not retrospective application. It came into force with effect from 30th September, 1954, and it must for that reason alone not be deemed to have retrospective effect.

This question came up for consideration in the case of *Ram Saran v. Lala Bir Sen* (1). That was a case in which the effect of the amendment in clause (a) aforesaid was considered and the learned Judge held that the amendment in clause (a) was not retrospective in effect and did not govern suits instituted validly under the law in force when they were filed but which could not have been instituted validly under the amended provision. We entirely agree with the above view about the amendment in clause (a) of section 3(1) of the U. P. Control of Rent and Eviction Act, 1954, held by the learned single Judge.

(1) 1958 A.W.R. 62.



Reliance was placed on behalf of the respondents on the case of *Raja Ram v. Madho Prasad* (1) decided by a Division Bench. The U. P. Control of Rent and Eviction Act, 1947, as originally enacted, exempted from its operation buildings which were not complete on the first day of July, 1946. By the amending Act of 1948 (U. P. Act XLIV of 1948) even buildings completed after the 1st of July, 1946, were brought within its purview. The question arose whether the amending Act of 1948 was retrospective or prospective. The suit itself out of which the said appeal came to this Court, was instituted prior to the coming into force of the amending Act, 1948, and related to an accommodation which was not complete on the 1st day of July, 1946. The learned Judges held that the Act of 1948 applied not only to future suits but also to pending proceedings. In other words, they held that even in the case of suits appeals though commenced prior to the coming into force of the Act 1948 but still pending, section 3 of the Act was attracted. They relied on five cases of this Court and ultimately came to this conclusion.

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"In the case before us, though it is true that the amendment was not retrospective, the whole scheme of the Act being such that it not only affected future suits but also pending proceedings and decrees already passed, it must be held that the amendment which came into effect during the pendency of the suit in the trial court had to be taken into consideration."

The above observation was made in view of sections 3, 14 and 15 of the Act of 1947 which were held to cover all types of cases whether pending or not.

In the first place we consider that the facts of the above case were materially different than here. By

(1) 1954 A.L.J. 195.

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the amending Act of 1948 properties which were then not covered by the provisions of the Act of 1947 were included in it and the question before the learned Judges was whether the inclusion of these other properties attracted the other provisions of the Act with reference to them. In the instant case no new property has been included but a change has been effected by the Act of 1954, in section 3(1) (a) and the simple question is whether this change in clause (a) has to be given retrospective application so as to affect even pending suits which were instituted prior to 1954.

It is settled law that normally a legislative enactment will not affect vested rights of parties unless the enactment has so expressly said or the legislative intention is otherwise borne out by it. The Legislature has no power to make a retrospective provision and if it does so there will be nothing wrong about it on the ground that it will affect vested rights or pending causes. But the enactment must show this intention either expressly or by necessary intendment. In the absence of anything in the enactment concerned to show that it is to have retrospective effect it will not be open to give it that intention or to alter "the law applicable to a claim in litigation at the time when the Act was passed."

There is nothing in the Act of 1954, which can support the conclusion that it was to have retrospective operation. The commencement clause, to which we referred earlier has instead provided that it shall come into force from the 30th September, 1954. There is thus the express provision against any retrospective operation. Prospective operation alone has been given to it with effect from the 30th September, 1954. We are unable to find any other provision also in the Act of

1954 to give retrospective operation to the amendment made in clause (a) section 3 of the main Act, to which the learned Judges referred in *Raja Ram's* case (1), is clearly prospective according to its language. Sections 14 and 15 of the Act may in a sense be said to be retrospective but actually speaking they too are not fully so. Section 14 provides that no decree for the eviction of a tenant from any accommodation passed before the date of the commencement of the Act of 1947 shall be executed in so far as it related to the eviction of such tenant during the continuance of the Act except on any of the grounds mentioned in section 3. Likewise section 15 has provided that in suits for eviction of a tenant from any accommodation pending at the said commencement a decree for eviction shall not be passed except on one or more of grounds mentioned in section 3. In both cases the restriction placed on the execution of a decree or the making of a decree for eviction has been circumscribed by the grounds found in section 3. To this extent, therefore, they do affect pending causes or decrees already passed. It must not, however, be overlooked that section 14 expressly relates to decrees passed before the commencement of the Act of 1947 and likewise section 15 to suits pending at the said commencement. The Act of 1947 commenced either on the 1st of July, 1946 from which date it was given effect to or when it was published in the *Gazette*. From whatever date its commencement is counted, none of the three suits here were suits pending at the said commencement.

Following the rule, therefore, that an enactemnt is not to have retrospective operation, unless it is so provided, sections 14 and 15 have given retrospective operation to the Act of 1947 to a limited extent only, namely, to decrees passed before its commencement and to suits pending on the date of its commencement. These

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sections cannot be warrant for the proposition that a suit filed after the commencement will also be governed or in any way affected by them. With great respect to the learned Judges in the above Division Bench case we are unable to hold that sections 3, 14 and 15 of the act of 1947, have the effect of conferring retrospective operation to the amending Act also.

We may at this very stage point out that in Special Appeal No. 1 of 1956 the attention of the learned single Judge apparently failed to be invited to the provision in section 15 which clearly confined the operation of that section to suits which were pending at the commencement of the Act of 1947. This section did not apply to suits instituted subsequently. This section is applicable to those cases only which were pending at the commencement of the Act of 1947 and in those cases a decree for eviction cannot be made except on one or more of grounds mentioned in section 3. But it has no application to cases, as the one before us, which were filed long after. In their case effect to the amended clause (a) of sub-section (1) of section 3 can be given in one circumstance only, viz. that the amendment itself has been given retrospective operation.

We may also point out that in order to read the intention of the Legislature as to whether the Act of 1954 was to have retrospective operation or prospective only, the intention has to be read and construed from the provisions of the Act of 1954 itself. It is that enactment which should ordinarily determine the true intention of the Legislature. The provisions of section 14, or for the matter of that, section 15 also which exist in a different enactment cannot in our opinion be validly imported in reading the legislative intention in the case of the Act of 1954. So far as this Act is concerned instead of giving any retrospective effect to it, the express provision made in it is that it shall come into force with effect from the 30th of September, 1954.

For the above reasons we are unable to hold that the amendment in clause (a) of sub-section (1) of section 3 by the Act of 1954 was retrospective in operation or required pending suits to be decided in accordance therewith. In this connection we may further point out that the right of suit is a vested right. That right had also been exercised. No question, therefore, remained about impairing that right, more so when there was no provision in the Act of 1954 so laying down.

In the result, therefore, we are of the opinion that all the three suits out of which the present appeals have arisen deserved to be decreed. We accordingly allow Special Appeal No. 1 of 1956 and set aside the judgment and decree of the learned single Judge and order the suit for eviction to be decreed with costs throughout. The other two appeals Nos. 168 of 1951 and 321 of 1953 are dismissed with costs.

*Special appeal no. 1 of 1956 allowed.*

*Others dismissed.*

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## APPELLATE CIVIL

*Before Mr. Justice Dayal and Mr. Justice James.*

PRAKASH CHANDRA VISHNU KUMAR

(APPELLANTS),

*v.*

STATE AND ANOTHER (RESPONDENTS).

1958  
September 3

**Private Carriers Permit**—*Condition in—To maintain and furnish a log book and not to carry certain articles on return journey—Validity of—Motor Vehicles Act, 1939, ss. 52, 53(2) and 68—United Provinces Motor Vehicles Rules, 1940, r. 94—Constitution of India, Arts. 19 and 226.*

A private carrier's permit being for the carriage of goods for or in connection with the trade or business carried on by the owner, it is necessary to judge and see whether the goods in question answer that description. The imposition of a condition regarding goods permitted for carriage may, therefore, be a reasonable restriction and there is nothing wrong in s. 53(2) of the Motor Vehicles Act which authorizes the same. The prohibition, however, against carrying empty used *bardana* and empty used tins of his own is not a reasonable restriction and is, therefore, invalid.

Rule 94 of the United Provinces Motor Vehicles Rules is valid but does not authorize the imposition of a condition for maintaining and furnishing a log book. Such a condition may, of course, be laid down under s. 53(2) of the Act and should be shown against item no. 8 and not 9 of the permit.

Decision of Tandon, J. affirmed on the former and reversed on the latter point.

Special Appeal no. 128 of 1958 from a decision of TANDON, J., dated 6th January, 1958 in Civil Miscellaneous Writ no. 3089 of 1957.

The facts appear in the judgment.

*B. N. Katju*, for the appellants.

The standing counsel for the respondents.

The Judgment of the Court was delivered by—

DAYAL, J. :—This is a special appeal against an order of Mr. Justice TANDON dismissing a petition under Article 226 of the Constitution subject to his finding that a

certain condition laid down in the permit issued by the Regional Transport Authority to the petitioner was invalid.

The petitioner firm was granted a private carrier's permit by the Regional Transport Authority, Kumaun Region. The conditions mentioned in the permit are:

"Shall ply on specified route. Shall not ply on hire or reward. Shall not carry restricted commodities without permit. Rules of the road must be observed. Shall observe all the conditions laid down under sections 59(3) to (f) of M. V. Act, 1939. Application for renewal of permit should be presented before this authority at least one month before the date of expiry. A log book should also be maintained and kept with the vehicle. A copy of the log book should also be submitted to this office fortnightly according to the columns prescribed by the R. T. A."

The petitioner prayed by his petition under Article 226 that a writ of *certiorari* be issued quashing the conditions imposed in the private carrier's permit of the petitioner restricting the petitioner from carrying the goods owned by him both ways on the route granted to the petitioner and also quashing the condition directing the petitioner to maintain a log book and to keep it in his vehicle and to submit a copy of the log book fortnightly to the office of the Regional Transport Authority. Besides these two prayers two other prayers were made for the issue of a writ of *mandamus*.

The learned Judge held that the condition about the log book could be legally imposed and that the condition restricting the petitioner to the carrying of empty used *bardana* and empty used tins of his own on a return journey was invalid. This condition was mentioned in the permit under the heading "Nature of goods to be carried."

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Mr. *Katju*, learned counsel for the appellant, has urged two points at the hearing of this appeal. One is that the provision in sub-section (2) of section 53 about the imposing of conditions relating to the description of goods to be carried laid an unreasonable restriction on his fundamental right of carrying on his trade. The other is that the condition about the maintenance of a log book, etc. cannot be imposed under sub-section (2) of section 53 of the Indian Motor Vehicles Act.

We are of opinion that the provision in sub-section (2) of section 53 for the imposition of condition relating to the description of goods to be carried is a reasonable restriction. Section 52 lays down that an application for private carriers permit should contain, and one of the matters to be mentioned in the application is the nature of the goods which the applicant expects normally to carry in connection with his trade or business. It may be mentioned that this 'private carriers permit' is an expression which refers to a permit to use a transport vehicle for the carriage of goods for or in connection with trade or business carried on by the applicant. When the permit is for such a purpose it is necessary that the Regional Transport Authority should know what sort of goods are to be carried in connection with that trade or business. It is left to the applicant for such a permit to mention the nature of goods which he expects normally to carry in connection with that trade. The Regional Transport Authority has to see whether the list of goods which he mentions as likely to be carried in connection with his trade or business contains any such item which has no bearing on that trade or business. Sub-section (2) to section 53 requires it to lay down as a condition the kind of goods to be carried and which, according to the opinion of the Regional Transport Authority, must be those which are carried normally in connection with that trade or business. The condition therefore cannot be said to be unreasonable. In fact it



is usually to be in accordance with what the applicant for the permit himself has mentioned. It may be that sometimes the Regional Transport Authority does not agree with the applicant about the nature of goods necessary to be carried in connection with the trade and mentions that article is not to be carried. That may give an occasion for the applicant to seek redress but merely because the Regional Transport Authority may commit some error does not make the provision itself to amount to an unreasonable restriction on the carrying on of trade.

We agree with the second contention of Mr. *Katju* that, among the conditions, it cannot be laid down that the permit-holder should maintain a log book and submit its copy to the Regional Transport Authority periodically. Sub-section (2) of section 53 does not mention such a condition. The learned junior Standing Counsel refers to rule 94 of the rules framed under section 68 of the Motor Vehicles Act. This rule provides that a Regional Transport Authority may by general or special order require the owner of any transport vehicle to maintain records and submit return in respect of the vehicle in such form as the Authority may specify. Clause (2) of sub-section (2) of section 68 provides for the making of rules with respect to the records to be maintained and the return to be furnished by the owners of transport vehicles. The expression "transport vehicles" includes the vehicles for which a private carriers permit is sought. Section 52 itself mentions that the application is for a permit to use a transport vehicle. It follows therefore that rule 94 is validly made and does apply to a vehicle for which private carriers permit is issued. This rule however empowers the Regional Transport Authority to make a general or special order in this respect but does not authorize it to lay it down as a condition. Conditions can be laid

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down only in accordance with the provisions of sub-section (2) of section 53. In fact the order about the maintenance of a log book should have been mentioned against serial item no. 8 of the permit which is headed as "The records to be maintained and the date on which returns are to be made to the Transport Authority." It follows that so much of the portion in the conditions of the permit as relates to the maintenance of the log book and the submission of its copy should be noted against serial item no. 8 and should be struck off from the condition noted against item no. 9 of the permit.

It has been held by the learned Judge that the restriction on the nature of goods to be carried on a return journey was invalid. This finding has not been challenged for the State.

For the reasons stated above we allow this appeal and order that a direction will be issued to the respondent no. 2 to quash the expression "on return journey to bring empty used *bardana* and empty used tins of his own" under the heading "Nature of goods to be carried" against item no. 6 of the permit, and that a further direction will be issued to quash the expressions "A log book should also be maintained and kept with the vehicle. A copy of the log book should also be submitted to this office fortnightly according to the columns prescribed by the R. T. A." under the conditions noted against item no. 9 of the permit. We further order that the latter expression which is deleted from the conditions be noted under the heading "The records to be maintained and the date on which returns are to be made to the Transport Authority" against item no. 8 of the permit. In the circumstances of this appeal we order the parties to bear their own costs.

*Appeal allowed.*

## CRIMINAL REVISION

*Before Mr. Justice Beg and Mr. Justice Bhargava*

MULU SINGH

V.

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1958  
October, 30

**Criminal Trial**—*Identification proceedings after release of accused on bail—Effect on evidentiary value of—Indian Evidence Act, 1872, s. 9.*

Where an accused secures his release on bail before identification proceedings on the express assurance that the same would be at his own risk and responsibility, he can not rely on that circumstance alone for discarding the evidence of identification, specially where there is no evidence to show what precautions, if any, the accused took to conceal his identity from the witnesses or to prove or suggest that he was actually seen by them or that there was any enmity between them and the accused.

The rule is founded not on the principle of estoppel but on the fact that each case has and must be decided according to its own peculiarities.

Dicta of Roy, J. to the contrary in *Ganga Singh v. State* (1) overruled.

Criminal Revision no. 929 of 1956, from an order of F. H. Shah, Additional Sessions Judge of Shahjahanpur, dated the 31st March, 1956.

The facts appear in the judgment.

*Hari Swarup*, for the applicant.

*The Assistant Government advocate*, for the State.

The judgment of the Court was delivered by—

BEG, J.:—This is a revision by one Mulu Singh who has been convicted under section 458, Indian Penal Code and sentenced to one year's rigorous imprisonment by the trial court. Mulu Singh appealed against his conviction. His appeal having been dismissed by the learned Additional Sessions Judge, Shahjahanpur, this revision has been filed by him.

(1) A.I.R. 1956 All. 122, 123.

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The applicant Mulu Singh was charged with having committed theft at the house of one Mangli at about midnight between the 25th and 26th of January, 1955.

The prosecution case was that Mangli was sleeping in his house on the night in question. He was awakened by some noise. On waking up he saw six or seven thieves inside his house. He raised an alarm which brought to the scene of occurrence a number of persons including Girdhari, Lakhan, Toley, Bindraban, Randhir, Ram Dayal and others. Ram Dayal had a gun with him. He fired it to scare away the thieves. The witnesses had torches which they flashed, and in the light of which they were able to see the faces of the thieves.

A first information report of this incident was made by Mangli on the 26th January, 1955, at 9.35 a.m.

Two persons, namely, the applicant Mulu Singh and one Raghubar were suspected of having committed the theft along with others. They were subjected to identification on the 26th April, 1955. In the identification proceedings they were identified by two persons, namely, Mangli and Lakhan. Thereafter the police sent up a charge-sheet against these two persons on the 7th May, 1955. They were tried, convicted and sentenced as above. The appeals filed by them were also dismissed.

This revision has been filed by Mulu Singh only.

Mulu Singh pleaded not guilty. His defence was that he was known to both the witnesses.

Before us the main argument of the learned counsel for the applicant is that the only evidence against the applicant in the present case is that of identification. This evidence consists of two identification witnesses, namely, Mangli and Lakhan, both of whom correctly identified the applicant during the identification proceedings and made no mistake. In this connection

counsel for the applicant has drawn our attention to the fact that an order for the release of the applicant on bail was passed by the trial court on the 17th February, 1955, and he was released on bail on or shortly after that date. The identification proceedings took place in jail on the 26th April, 1955. It appears that during the period intervening the release of the applicant on bail and the identification proceedings, the applicant was called to jail a number of times for holding the identification proceedings. The identification proceedings were not held on those dates, and both the applicant as well as the identification witnesses were present in jail on those dates. From this fact it is argued by the learned counsel for the applicant that it necessarily follows that the witnesses must have seen the applicant when they visited the jail. It is, therefore, argued that the identification proceedings have no value.

Having heard the learned counsel for the applicant and given our careful consideration to this part of his argument, we are of opinion that there is no substance in it. It may be mentioned that when the order for the release of the applicant on bail was passed on the 17th February, 1955, on behalf of the prosecution the attention of the Magistrate was drawn to the fact that the accused would be put for identification and that he should, therefore, not be released on bail. At that time it was represented on behalf of the accused that he should be released on his own responsibility and at his own risk. After receiving these assurances on behalf of the accused, i.e. the present applicant, he was ordered to be released on bail. Under these circumstances, it was the look-out of the accused, if he went to jail, to see that he went there *ba pardah*. He went to jail fully knowing that his identification proceedings would be held there. He must also have known that the witnesses for the prosecution would be coming there. If he did not take the elementary precaution of concealing his

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face when he went there, we do not see how this act on his part can be utilized by him for the purpose of securing his acquittal. Moreover, there is no evidence before us to establish the fact that any of the witnesses actually saw the applicant. It is possible that both the witnesses, as well as the accused visited the jail on the same date without the witnesses having seen the accused there. This conclusion is strongly supported by the fact that an examination of identification proceedings indicates that not less than six witnesses were called to identify the two accused. Out of the six witnesses, only two witnesses, namely, Mangli and Lakhan were able to identify the accused correctly. The evidence shows that Mullu came into close contact with the thieves as there was a marpit between him and them. The next witness, viz. Lakhan was an immediate neighbour who rushed to the spot on hearing the alarm and saw the thieves. These two witnesses were, therefore, the best and the most natural witnesses of the incident. The accused never made any application to the Magistrate that he was at any time seen by any witness nor did he make any oral statement to that effect at that time. The accused's own plea in court was that he was known to the witnesses. If so, the question of showing becomes quite immaterial. In fact the two pleas are inconsistent. As already observed, there is no direct evidence to indicate that they came face to face with each other on any of those dates. It is possible that they might have come independently to jail on the same date and gone back without seeing the other. The proceedings in jail, after all, are not like proceedings in court. There is no direct evidence even to the effect that the applicant went to jail on those dates with his face open. For aught we know, he might have gone there in a *doli* or *ba parda*. Although the applicant did produce two defence witnesses, they were produced to indicate that both Mullu as well as Lakhan knew the accused from

before the dacoity. It also appears that during the trial no question was put to any of these witnesses to the effect that they had actually seen the two accused on any of the dates when they had visited the jail in connection with the identification proceedings. It further appears from the record that there is no enmity at all between the identification witnesses and any of the accused. Therefore, there appears to be absolutely no reason why the witnesses should go out of their way to falsely identify the accused. Further it is also to be noted that both the courts below have placed reliance on the two identification witnesses and considered their evidence to be trustworthy and truthful. At this stage of revision, we are unable to find anything unreasonable or perverse in the conclusions arrived at by them, nor can their findings in this regard be said to be vitiated by any error of law or procedure.

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Learned counsel for the applicant has invited our attention to a single Judge decision of this Court in *Ganga Singh v. State* (1). The present case was originally heard by a learned single Judge of this Court. It is only after the above decision was cited before him that a reference was made by him to a Bench for a reconsideration of the matter. No doubt the observations made in that case by the learned Judge lend support to the contention of the counsel for the applicant. In that case also the accused was let off on bail on his own undertaking and at his own risk. In this connection the learned Judge made the following observations:

“An undertaking of that nature never acts as an estoppel and what the Magistrates in such a case have to consider is whether prudence requires that bail should be granted at that stage. If bail is granted, the risk of the accused person being seen by the witnesses before the identification

(1) A.I.R. 1956 All. 122.

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proceedings are held cannot be eliminated. And if that risk is there, the identification proceedings are reduced to an absolute farce.

"Under these circumstances the courts below should not have acted upon the evidence of identification, which was tainted and especially when there was no proof on the record as to how these witnesses who had identified came to know of the features of the accused persons in the absence of any description having been given by them either in the first information report or at the inquiry conducted by the police. Under these circumstances, the conviction of the applicants was not based upon proper evidence or upon appreciation of evidence." (p. 123).

We may observe in the beginning that it was not necessary in that case to go into the matter at all, in view of the fact that in the earlier part of the judgment it was held that the accused was otherwise known to the witnesses. If the accused was known to the witnesses, then the identification proceedings would be a farce in any case. With the abstract proposition of law laid down in this case we find ourselves in respectful disagreement. There is no law that the identification proceedings are necessary in a case where the accused is not known to the witnesses. There is also no law that a particular number of identification witnesses are necessary in order to justify conviction on the basis of identification. On matters like these, the Court is governed by rules of common sense and prudence. There may be cases in which the evidence of a single witness might be enough to justify conviction. There was, for instance, a case which I recollect and in which certain accused persons were convicted of dacoity on the single identification evidence of a girl. This girl was abducted by the dacoits and kept by them for several weeks, and then passed on



by them to another party from whose possession she was subsequently recovered. The suspected dacoits having been put up for identification, this girl was able to identify all of them without any difficulty and without committing any mistake. There was absolutely no enmity between her and the dacoits, and there was absolutely no reason why she should falsely implicate them. The girl in fact, had never seen or known the dacoits previous to the dacoity. In the peculiar circumstances of the case, the conviction of the accused for dacoity was sustained by me on the single identification evidence of such a witness. In ordinary cases, however, where there is no evidence except that of identification, the courts do not convict an accused person unless there is reliable evidence of identification by at least two witnesses. The rule, however, is not a rule of law but a rule of caution. The value to be attached to the identification proceedings would depend on the circumstances of each particular case. Where there is evidence to indicate that the police have shown the accused to the witnesses, an adverse inference would arise against the prosecution. The reason is that in such a case the Court is rightly led to suspect that the accused was not seen at all by the witnesses during the incident, and the police, therefore, resorted to this device for the purpose of getting the accused recognized by the witnesses with a view to secure his conviction. Where, however, the accused secures his release on assurances held by him to the Court that he would himself be responsible for taking steps to conceal his face and yet deliberately goes to a place fully knowing that he could be seen there by the identification witnesses without taking any precautions whatever to conceal himself, we do not see how the accused can be allowed to take advantage of his own conduct. The question in such a case is not of estoppel at all. In a criminal case it is open to the accused to take any plea that he likes. The worth of the plea will

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have to be determined by the particular circumstances of each case. Nor can the evidence of the identification witnesses be considered, to be tainted evidence. As we have already observed, the value of the identification evidence would depend upon the circumstances of each case. We have enumerated the circumstances in the present case. We are of opinion that bearing in mind the circumstances of the present case, the fact that the applicant was released on bail would not detract from the value of identification proceedings at all. It might be that the accused went to jail with his face open because he knew fully well that the witnesses had seen him while he was committing theft and that he would be recognized by them. He might, therefore, have adopted this device for the purpose of enabling him to defeat the ends of justice by advancing the argument that the identification proceedings had become useless. The accused might as well have gone to the house of the witnesses and shown his face to them just to enable him to subsequently put forward an argument that the identification proceedings against him had become a farce, and he had thereby become immune from conviction. We are not prepared to countenance such devices on the part of the accused. For the above reasons, in view of the circumstances of the present case, we find ourselves unable to give effect to the arguments of the learned counsel for the applicant.

In the end, the learned counsel for the applicant argued that, on the facts made out in the present case, a charge of dacoity should have been framed by the trial court. The case was tried by a Magistrate. The offence of dacoity is not cognizable by a Magistrate. It was, therefore, argued that the trial of the applicant was null and void in law. It is no doubt correct that the facts alleged would make out a case of dacoity. We would have allowed this request and ordered a retrial of

the applicant. The learned counsel, however, after a reconsideration of the matter, withdrew this argument, as he did not consider that a retrial would be in the interests of the applicant.

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No other argument was advanced before us.

We see no substance in this revision. We, accordingly, dismiss the revision and uphold the conviction and sentence of the applicant. The applicant is on bail. He shall surrender forthwith and undergo the sentence imposed on him.

*Application dismissed.*

### CIVIL MISCELLANEOUS

*Before Mr. Justice Gurtu and Mr. Justice J. Sahai\**  
PIRTHWINATH CHOWDHRY (PETITIONER),

v.

STATE OF UTTAR PRADESH (OPPOSITE-PARTY).

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**Master and Servant**—Appointment for a term of years as a specialist—No age-limit at the time of appointment—Rule amended laying down age-limit for service—Termination of service, validity of—U. P. Law Officers Rules, 1942, r. 7, scope of—Retrospective or prospective—Constitution of India, Article 311, applicability of.

P. N. Chowdhry, the petitioner, was the Additional Government Advocate in the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, even prior to the 16th April, 1957 and he received a notification on the 18th April, 1957, that he was reappointed as Additional Government Advocate, Lucknow Bench, Lucknow, for a further period of 3 years from 16th April, 1957. The petitioner was governed by U. P. Law Officers' Rules, 1942, which do not lay down any age-limit. By a notification dated 20th December, 1957, rule 7 of the U. P. State Law Officers' Rules was amended and a new rule provided for superannuation at the age of 60 years. The petitioner was to attain the age of 60 years on 25th August, 1958, and in July, 1958 on hearing the rumour that the appointment of an Additional Government Advocate was in contemplation, he submitted to the Hon'ble Minister of Justice, U. P. that the new rule

\*Sitting at Lucknow.

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7 did not apply to him and he also submitted a written representation to that effect. On 10th September, 1958 he was informed by the State that term of appointment as Additional Government Advocate expired on 25th August on his attaining the age of 60 years but the Governor was pleased to allow him to work till an order is passed on his representation. On 24th September, 1958 he was informed by the State that his representation was rejected and that Sri D. P. Uniyal has been appointed as an Additional Government Advocate in his place from 1st October, 1958, and that the petitioner should make over charge to him.

The petitioner has filed a writ petition against the order of the 24th September, 1958.

*Held*, (i) that the petitioner cannot be deemed to be a member of the Civil Service of the State of U. P. but he is holding a Civil post within the meaning of Article 311 of the Constitution of India.

*Lachmi v. Military Secretary* (1), *Sukhnandan Thakur v. State of Bihar* (2), *James Hall v. State of Wisconsin* (3), *United States v. Hatwell* (4) relied on.

(ii) that if the new rule 7 does not apply to the case of the petitioner, the petitioner's removal before the expiry of the period of 3 years for which he had been appointed would amount to a punishment or would be a removal within the meaning of Article 311(2) of the Constitution of India. No opportunity was given to the petitioner before the service of the petitioner was terminated.

*P. L. Dhingra v. Union of India* (5) relied on.

(iii) that a statute should not be so construed as to take away or extinguish the right of any person unless it appears by express words or by plain implication that it was the intention of the Legislature. Clear terms ought to be used if it is intended to divest a vested right.

(iv) that there is nothing in the language of the new rule 7 which makes it retrospective in its application and the rights of the petitioner are not affected by this rule and the petitioner has a right to continue as an Additional Government Advocate for a further period of 3 years from 16th April, 1957.

Writ Petition no. 204 of 1958 under Article 226 of the Constitution of India.

The facts appear in the judgment.

*Iqbal Ahmad, B. K. Dhaon, S. D. Misra, Bishun Singh, Kesri Bir Prasad, K. S. Verma*, for the applicant.

The standing counsel for the State.

(1) A.I.R. 1956 Pat. 398.

(2) A.I.R. 1957 Pat. 617.

(3) (1880) 103 U. S. 5.

(4) (1868) 73 U. S. 380

(5) A.I.R. 1958 S. C. 36, 47 & 48.

GURTU, J.:—This is a writ petition by Prithwi Nath Chowdhry. The petitioner even prior to the 16th April, 1957 was Additional Government Advocate in the High Court of Judicature, Allahabad, Lucknow Bench, Lucknow and by a notification no. 727(a)/VIII—372-57, dated 18th April, 1957, he was reappointed Additional Government Advocate, Lucknow Bench, for a period of three years with effect from the 16th April, 1957. At the time of the original appointment and of re-appointment of the petitioner as Additional Government Advocate there was no age-limit prescribed by the U. P. Law Officers Rules, 1942, which were and are the rules applicable to the petitioner. By notification no. 6349/VII—889 of 1957, dated 20th December, 1957, rule 7 of the U. P. State Law Officers Rules was substituted by a new rule 7. That new rule provided for superannuation at the age of 60. The petitioner who was to attain the age of 60 years on the 25th August, 1958, and in July, 1958 heard a rumour that the State Government had asked the High Court to recommend names of Advocates for appointment as Additional Government Advocate for the Lucknow Bench of the Allahabad High Court. The petitioner then had an interview with the Hon'ble Minister of Justice, U. P. and submitted to him that the new rule 7 would have no application to the petitioner and in pursuance of the interview also submitted a written representation to the Hon'ble Minister of Justice, U. P., on the 20th July, 1958. Thereafter the petitioner received a communication, dated 10th September, 1958, from the opposite-party to the effect that his term of appointment as Additional Government Advocate had expired on the 25th August, 1958, on his attaining the age of 60 years, but that the Governor was pleased to allow him to work till a final decision was taken on his representation. Later on the 24th September, 1958, a further communication was received from the opposite-party stating that the

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petitioner's representation for being allowed to work till the 15th April, 1960, had been rejected and that it had been decided to appoint Sri Debi Prasad Uniyal, the then Deputy Government Advocate, High Court, in his place with effect from the 1st October, 1958, and that the petitioner should make over charge to him.

Upon these allegations the petitioner has come to this Court and he prays for a writ in the nature of *certiorari* or any other suitable writ, direction or order to be issued quashing the order dated 24th September, 1958, above referred to.

The facts sworn to by the petitioner, as stated hereinbefore, were not disputed in the counter-affidavit, which was filed on behalf of the State of Uttar Pradesh by one A. B. Buck, Assistant Secretary to Government, U. P. Judicial Department, Lucknow.

The petitioner's case is that the reappointment of the petitioner being to a tenure post for a fixed term of three years, the petitioner had an absolute right to hold the post of Additional Government Advocate till the 16th April, 1960, and that he was subject to removal only in accordance with the U. P. State Law Officers Rules, 1942, as they existed at the time of his said reappointment. The petitioner contends that his said reappointment in April 1957 having been made at a time when no age limits were prescribed for retirement from the posts of law officers the petitioner could not be removed from the said post before the expiry of three years from the 16th April, 1957, except in accordance with rule 14 of the rules. The petitioner contends that the new superannuation rule 7 which was substituted for the old rule 7 did not and could not in terms apply to the petitioner and that the order of his removal from his post of Additional Government Advocate with effect from the 1st October, 1958, is without jurisdiction. He contends that the new rule 7 cannot be given retros-

pective effect and is only a prospective rule. Further he contends that inasmuch as there was no power in the Governor to terminate his services on the ground of superannuation, therefore, the said termination could not but operate as his removal from service. He contends that such removal has taken place without complying with rule 14 of the U. P. State Law Officers Rules, 1942, which provides for a reasonable opportunity of being heard and also without complying with the provisions of Article 311(2) of the Constitution of India.

As there was no clear averment in the affidavit filed along with the petition that the petitioner had not been given any opportunity of showing cause against the action proposed to be taken by the opposite-party Government, nor was there any clear averment that no notice of any kind was given to him, we thought it necessary that he should be asked to file an affidavit to that effect which affidavit was filed. Thereupon we asked the learned counsel for the State to intimate whether he wanted time to file any counter-affidavit by way of refutation of the statement made in the additional affidavit filed by the petitioner at our instance. The learned Counsel said that no time was necessary.

It was we may state conceded by both sides that the appointment and re-appointment of the petitioner as Additional Government Advocate was made under the U. P. State Law Officers Rules, 1942. These rules are reproduced in Annexure II attached to the affidavit and it is from this annexure that the rules were read during the course of arguments. We will now consider what are the petitioner's rights.

The first question which arises is whether the petitioner is an employee of the State holding a Civil Post. It was not seriously disputed that he was an employee of the State, nor could it be disputed because rule 2 of the U. P. State Law Officers Rules, 1942 makes it abso-

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lutely clear that the post of Additional Government Advocate carries with it part-time civil employment under the State (I have substituted the word "State" for the word "Crown", which appears in the rule). The post under rule 2 is described as a tenure post and is to be classed as a "specialist post." Rule 10 provides that the Governor is to be the appointing authority. Rule 13 provides for the filling up of the temporary vacancies. Rule 15 provides that "except as provided by these rules, the pay, allowances, leave and other conditions of service of a person appointed as a law officer shall be regulated by the general rules made by the Governor under clause (b) of sub-section (2) of section 241 of the Government of India Act 1935 . . . and by and in accordance with the provisions of paragraph 15(2) of the Government of India (Commencement and Transitory Provinces) Order, 1936." There can, therefore, not be the slightest doubt, and this has been virtually conceded, that the petitioner is a State servant holding a civil post.

The next question is, to what class of State servants the petitioner belongs. We have already indicated that the rule itself classifies the petitioner as a specialist holding a tenure post. He was admittedly reappointed for a term of three years. The petitioner does not hold his post in a temporary or officiating capacity or on probation. He holds the post for a fixed term of three years, i.e., he holds the post permanently for that fixed period.

Under rule 14 of the U. P. State Law Officers Rules the Governor has as already indicated reserved to himself the right to remove or suspend any law officer at any time during the term of his office for misconduct or dereliction of duty subject to the provision that no law officer shall be so removed unless he has had a reasonable opportunity of being heard in his defence. Except, therefore, in a case where the petitioner is



liable to removal under rule 14 and in accordance therewith, he has an absolute right to continue in the post of Additional Government Advocate for three years.

When he was re-appointed to the post, rule 7 to which reference has been made ran as follows:

"No age-limits are prescribed for appointments to the posts of law officers, but appointments shall be made with due regard to the physical fitness of the candidates."

Therefore, on that date there was no rule of superannuation and no age-limit was fixed on the reaching of which the services of the petitioner could be terminated. It is clear therefore that inasmuch as the petitioner is a State servant who has been appointed under the U. P. State Law Officers Rules, if old rule 7 be not deemed to have been replaced by the new rule 7, his services could not be terminated on any other ground, except that mentioned in rule 14.

The question is whether by virtue of the substitution of the old rule 7 by the new rule 7 this position has altered. The new rule 7 was made by virtue of a notification issued on the 20th December, 1957, which ran as follows:

"In exercise of the powers conferred by Article 309 of the Constitution of India, the Governor of Uttar Pradesh is pleased to make the following amendments in the U. P. State Law Officers' Rules, 1942:

*Substitute the following:*

"For the existing rule 7 of the U. P. State Law Officers Rules, 1942, substitute the following:

7. *Age*—A law officer shall be appointed or re-appointed with due regard to his physical fitness, but shall not be ordinarily retained in service after attaining the age of

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sixty years. Provided that the Governor may in any case retain a law officer after he has attained the age of sixty years."

It will be observed that even this substituted rule does not fix any age-limit for appointment of a law officer and provided that he is physically fit and otherwise qualified a law officer may be appointed up to within one day of his attaining the age of sixty years. Further after he has been so appointed, his services are not ordinarily to be retained after his attaining the age of sixty years but may still be retained if in any case the Governor so wishes. If this rule has retrospective effect and if it can be deemed to have been in existence by virtue of retroactive operation even on the date when the petitioner was re-appointed, then no doubt the petitioner having reached the age of sixty years was liable to have his services terminated because of his superannuation. He could not claim to be retained because it would be for the Governor to decide whether he having attained the age of sixty should or should not be retained, and inasmuch as in such a case he could not be said to have been removed neither rule 14 of the rules of his service nor Article 311(2) of the Constitution could be of help to him.

The crux of the matter, therefore, is whether this rule has retrospective effect. In *Corpus Juris* (Vol. 59 at pp. 1158-1159) it is stated as follows:

"Literally defined, a retrospective law is a law that looks backward or on things that are past; and a retroactive law is one that acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may be broadly defined as having reference to state of things existing before the Act in question. A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested

rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past."

Inasmuch as the effect of giving retrospective or retro-active effect to the present substituted superannuation rule 7 would be to deprive the petitioner of a vested right, we have to see whether upon the language of the substituted rule, reading it fairly, the rule can be said to have retrospective operation.

It is well-settled that the Legislature is presumed to enact prospectively and not retrospectively. But equally there can be no presumption that an Act is not intended to interfere with existing rights. Equally it is well-settled that where two interpretations are possible, a prospective construction ought to be given.

It, therefore, becomes necessary to carefully examine the language of substituted rule 7. I have already quoted it hereinabove. The substitute rule does not in terms indicate that it has to be given retrospective effect. It uses the words "shall be appointed or re-appointed . . . ." These words clearly suggest appointment or re-appointment at a date subsequent to the enactment of the substitute rule. The words clearly imply not only an obligation but futurity as well. If it had been intended by this rule that it would apply to the present incumbents of posts, the rule would undoubtedly have been drafted differently in order to indicate that the rule was to be applicable not only to future appointees but to existing appointees also. In my view the substituted rule 7, while it may be capable of the interpretation that it covers the case of law officers who have already been appointed is also capable of the interpretation that the substituted rule concerns itself with such law officers as are to be appointed after the rule has been framed. I am, therefore, free to

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give to this rule such an interpretation as will make the rule prospective and thus protect existing rights.

I have regard to the fact that it would have been quite a simple matter for draftsmanship to incorporate such words as would have clearly put the interpretation beyond doubt and would have made the rule in terms retrospective. Therefore, it is reasonable to assume that if it had been intended to give retrospective effect to this rule, that would have been done in clear terms. The omission to make the rule retrospective by incorporating the necessary words seems to suggest that it was not intended by the rule that a person for example who had been appointed for three years only six months previously should be caught within the mischief of this rule. Unless this substituted rule 7 is given retrospective effect the repeal of the earlier rule 7 by this rule would not destroy the accrued rights of the petitioner in view of section 6(c) of the U. P. General Clauses Act, which is as follows:

"Where any Uttar Pradesh Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

• \* \*  
"(c) alter any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed . . . ."

In my view, therefore, the substituted rule 7 which has been made under the powers conferred by Article 309 of the Constitution of India, inasmuch as it is not of retrospective effect, does not destroy the right of the petitioner under the rules of his service to hold the tenure post of Additional Government Advocate for the full period of three years ending April 15, 1960, and there is no power in the Governor to terminate his services on the mere ground of superannuation.

As there is no power to terminate the petitioner's services for reasons of superannuation, the termination in this case can only have the effect of petitioner's removal from the post of Additional Government Advocate. It is true that the Governor did not purport to remove the petitioner but only purported to terminate his services on the ground of superannuation, but whatever may have been his intention the effect of the letter dated the 24th September, 1958, undoubtedly is that the petitioner cannot continue to discharge his duties as Additional Government Advocate for the remaining period of his three years term and he has to hand over charge to Sri Debi Prasad Uniyal, Deputy Government Advocate and to remove himself.

No doubt State Officials hold their office during the pleasure of the Governor, but the Governor may place upon his own powers limitations in regard to terminating their services and under the U. P. State Law Officers Rules, 1942 as they were in 1957, and which admittedly are applicable to the petitioner, the Governor has placed a limitation on his power of terminating the petitioner's services. Therefore even according to the special term of the petitioner's appointment he would be entitled to the protection afforded by rule 14 in that he could not be removed unless he has had a reasonable opportunity of being heard in his defence. But apart from the protection of rule 14, inasmuch as the petitioner is undoubtedly a person who held his office not in an officiating or temporary or probationary capacity but held it permanently for the duration of his 3 years tenure, he was in my view entitled to the protection afforded by Article 311(2) of the Constitution of India. This I think clearly flows from the categorization made in *Parshotam Lal Dhingra v. Union of India* (1) in regard to those kinds of posts the removal

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(1) A.I.R. 1958 S.C. 36.

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from which involves a punishment *per se* and those in the case of which removal does not operate as punishment *per se* and does not straightaway afford the protection given by Article 311(2) of the Constitution of India. The appointment of the petitioner to this tenure post for a definite period of three years made the petitioner the permanent holder for the duration of three years of a substantive post or in the alternative it made him the holder of a temporary post for a definite specified period. *Qua* the petitioner the post of Additional Government Advocate could not be said to be occupying the post either in an officiating or a temporary or a probationary capacity. This I think clearly flows from *Parshotam Lal Dhingra v. Union of India* (1).

As admittedly the petitioner has not had either the benefit of a show cause notice under rule 14 of the U. P. State Law Officers Rules or under Article 311(2) of the Constitution of India and in the absence of any power to terminate the petitioner's services for superannuation, the communication dated the 24th September, 1958, has the result of removing the petitioner from the office, the said removal is therefore beyond the power of the Governor. Relief will, therefore, have to be given to the petitioner.

A half-hearted submission was made on the strength of the letter dated 10th September, 1958 that the petitioner having worked after the receipt thereof was estopped from challenging the superannuation rule. The petitioner has never accepted the position that he is touched by that rule and no question of estoppel can arise.

I might add, that although no clear contention was raised on behalf of the petitioners, that the Governor could not make retrospective changes in his service rules under Article 309 of the Constitution, nonetheless it

(1) A.I.R. 1958 S.C. 36.

was urged that that the substitute rule even though it may have been intended to be retrospective could not effect the petitioner's rights. Reliance was placed on the case of the *Union of India v. Askaran* (1). The passage which has been relied upon is from the judgment of WANCHOO, C.J. and runs as follows:

"All that is required in order that the President or the Governor may exercise his pleasure under Art. 310 is that there should be rules in force laying down the manner in which the pleasure would be exercised. This means that generally speaking the protection to a public servant is only this that his services would not be terminated unless it is done under some rule or law framed under Article 309, and that *the rule to be applied to him should be in existence before he joins the service*. The existence of the rule at the time a public servant joins service may be inferred from the decision of the Supreme Court in *Shyam Lal v. State of U. P.* (2). As such, if a para like 148 of the Code is in force when a public servant joins railway service, his services are liable to be terminated in the terms of that rule without in any way violating the so-called spirit of the Constitution."

It is contended that this passage clearly indicated that the rule had to be in existence before a person joined the service. In making this submission it is overlooked that the precise effect of making a rule retroactive or retrospective is that it is deemed to have always been in existence. I do not think, therefore, that this passage implies that even a subsequent retrospective rule framed under Article 309 of the Constitution of India would not be effective to alter pre-existing rights.

Because of the reasons hereinbefore set out, I am of the view that a writ of *mandamus* should issue in this case.

(1) A. I. R. 1958 Raj. 250, 255.

(2) A.I.R. 1954, S. C. 369.

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It is needless to add that it would be open to the Governor to create another post of Additional Government Advocate and to appoint Mr. D. P. Uniyal to the same, if he so wishes.

J. SAHAI, J.:—The facts giving rise to this petition have been fully given by my brother GURTU and it is not necessary to narrate them again in this judgment. The questions for determination in this case are as follows:

1. Whether or not the petitioner Sri Prithwi Nath Chowdhry was a member of the civil service of the State of Uttar Pradesh or held a civil post under the said State within the meaning of Articles 310 and 311 of the Constitution of India?
2. Whether the termination of the petitioner's services amounts to an order of removal so as to attract the provisions of Article 311 of the Constitution of India?
3. Whether the new rule 7 of the U. P. State Law Officers' Rules, 1942, is prospective or retrospective in its application and whether the petitioner could be retired from service before completing full three years of service after his reappointment?
4. Whether a writ can be issued in the circumstances of the present case?

Admittedly the petitioner was appointed as a law officer under the United Provinces Crown Law Officers' Rules, 1942 (hereinafter called the Rules). Rule 2 of the said Rules runs as follows:

"2. The posts dealt with by these rules are tenure posts and are classed as specialist. They carry with them part-time civil employment under the Crown."

The petitioner was thus in the part-time civil employment of the State of Uttar Pradesh and was holding a tenure post classed as specialist. "Tenure post" has



been defined in the U. P. Fundamental Rules as follows :

"*Tenure post* means a permanent post which an individual government servant may not hold for more than a limited period."

The petitioner in this case was appointed on the 16th of April, 1957 to hold the office of Additional Government Advocate for a period of three years from that date. It is not the petitioner's case, and it cannot be his case, that he belonged to the civil service of the Union. In order to decide whether he belonged to the civil service of this State it will be necessary to determine as to what does the expression "member of. . . a civil service of a State" mean. The expression "civil service" has not been defined in the Constitution or anywhere else. In the Oxford Dictionary its meaning has been given as follows :

"1785 orig. That part of the service of the East India Company carried on by the covenanted servants who did not belong to the Army or Navy (cf. SERVICE); now all the non-warlike departments of the public administrative service of the State. Also the body of servants of the State employed in this service."

In England administrative government is carried out mainly by departments, e.g. the Treasury, the Foreign Office, the Home Office, the Commonwealth Relations Office, the Colonial Office, the War Office, the Law Officers Department, the Post Office, the Ministry of Labour and National Service, the Ministry of Transport, etc. The departments are staffed by administrative, professional, technical, executive and clerical officers who constitute the civil service. There are various grades in the civil service in England. Thus in England the members of the administrative grade, the professional, scientific and technical officers, the members of the executive grade, the clerks, the typists, the workers in the post office, the service departments and

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doubt the emoluments which are paid to the petitioner are described as pay or salary. To my mind they are in the nature of fees for professional service rendered, and the relations between the Government and the petitioner is that of a client and a professional man. It is open to a client either to pay his counsel case-wise or a consolidated sum every month for all the work that he does for him during the month. A Senior or a Junior Standing Counsel is also appointed by the Government under the Rules. Exactly the same rules apply to the two classes of Government Counsel, i.e. the Government Advocate and the Additional Government Advocate who deal with criminal cases and the Senior and the Junior Standing Counsel who deal with civil cases of the Government. The Senior and the Junior Standing Counsel are paid fees either for every case or on daily basis and not a fixed sum at the end of the month by way of pay or salary. If their emoluments cannot be described as salary but only as fees it is difficult to see how the emoluments of an Additional Government Advocate can be held to be salary. Under these circumstances it is difficult to hold that the petitioner belongs to the regular services of the State or is a member of the public service of this State, whether of class 5 of rule 14, i.e. specialist service or of any other class. To my mind the words "member of a civil service of a State" in Article 311 of the Constitution mean member of a public service on the civil side of the administration and not being a member of the defence service. In my opinion the relationship of master and servant exists between the State Government and the petitioner in a very limited sense. The relations between them were of a client and a professional man. Just as it is open to a private litigant to retain the services of an advocate for a fixed period of time on a fixed amount every month it was open to the Government to employ the services of the petitioner as Additional Government Advocate. The

work that he was required to do was to appear on behalf of the Government in cases in which the Government was a party. In other words the services he rendered in the Government were in the nature of professional services rendered by a lawyer to a client. When the Government is a party to a proceeding in a court it is not exercising any of its governmental or sovereign functions and its position is the same as that of any other litigant. I am therefore of the opinion that the petitioner cannot be deemed to be a member of any public service. It is true that in rule 2 of the rules law officers have been described to be in part-time civil employment of the State. The word "employment" does not necessarily mean employment in the sense of being a servant. Even professional men, e.g. a lawyer or a doctor can be employed. Even if it be assumed that the expression "part-time civil employment" means some sort of service and the emoluments paid to the petitioner as salary that would not in any way make the petitioner a member of any service. It is admitted that the petitioner was employed only for three years. It is also admitted that his employment was part-time. In the case of *Commissioner of Income-tax, Bombay City v. Mrs. Durga Khote* (1), Chief Justice CHAGLA observed as follows:

"Mr. Joshi's contention is that if you look at the terms of the contracts, it is clear that a relationship of master and servant is established between the film companies and the assessee, and according to him if that relationship is established, then the assessee is a salaried servant of the film companies and the income she received was in the nature of her salaries. Now, the mere establishment of relationship of master and servant is not sufficient when we are dealing with a person who is practising a profession, because in the course of the practice of

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(1) A.I.R. 1951 B.C. 241.

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that profession it may become necessary for the person to get himself or herself engaged to a particular master temporarily. But even while he or she is so engaged, he or she is really practising his or her profession and the service is merely incidental to that profession. The position is different when a professional person permanently accepts an employment and exchanges his profession for service.

It is clear on the facts of this case that Mrs. Durga Khote was not giving up her profession and was not exchanging her profession for any service. It is in order to carry out her profession of a film actress that she entered into various contracts with the film companies. Her employment was temporary and incidental to her profession and she had no intention permanently to engage herself with any company. She was completely fancy free after her contracts with the film companies were carried out to lend her services to any other company she desired. It is difficult to see how on the facts of this case it can ever be stated that she exchanged her profession for service and ceased to practise her profession and became a salaried servant of the various film companies, with whom she was working, in order to practise her profession."

I respectfully agree with the observations mentioned above, and hold that even while the petitioner took up a part-time employment with the State of U. P. to prosecute its cases for a period of three years he continued to practise his profession and never gave it up for any service. For these reasons I am of the opinion that the petitioner cannot be deemed to be a member of the civil service of the State of U. P.

It has next to be considered whether the petitioner is holding a civil post under the State of U. P. within the

meaning of Article 311 of the Constitution of India. It would be noticed that Article 309 of the Constitution contemplates appointments to public service as also appointments to posts in connection with the affairs of the Union or of a State. Article 310 of the Constitution mentions three things: Membership of a defence service, membership of a civil service and the holding of any post connected with defence or any civil post. The holding of a post therefore is quite distinct from being a member of a civil service. Even in section 240 of the Government of India Act, 1935, there was a clear distinction between a member of a civil service and the holder of a civil post. In my opinion the expression "holds a civil post" means holds a post on the civil side of the administration under a State which partakes the nature of service either wholly or partly in the sense that it is an office and carries emoluments with it. I have already mentioned in an earlier part of this judgment that Part XIV of the Constitution is headed as "Services under the Union and the States", and Chapter I of that part as "Services". The provisions of Articles 309 to 311 fall under Chapter I of Part XIV of the Constitution. Taking the head-note into consideration it must be held that Article 311 will apply not to the holders of all civil posts in the Union or a State but to the holders of those posts which are in the nature of services. The post of a Mukhia appointed under section 45 of the Code of Criminal Procedure must be held to be a civil post but it cannot be a civil post within the meaning of Article 311 of the Constitution because it is not in the nature of a service. The words "civil post" have also not been defined anywhere. In the case of *Lachmi v. Military Secretary* (1), Chief Justice Das observed as follows:

"I think that the expression 'civil post under a State' means that the post is under the control of the State; that is, the State can abolish the post if

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it so desires, or the State can regulate the conditions subject to which the post is or will be held. The real test, therefore, is the immediate or ultimate control which is exercised by the State with regard to the post in question."

On the basis of the case mentioned above with which I fully agree, if the post of the Additional Government Advocate is a post, it would be a civil post within the meaning of Article 311 of the Constitution of India but the question is whether it can be called a post or an employment. The question as to what is a post arose in the case of *Sukhnandan Thakur v. State of Bihar* (1) and RAMASWAMI, J., observed as follows:

"Article 16 expressly makes a distinction between 'appointment' and 'employment'. These two words occur not only in Article 16(1) but also in Article 16 (3). Article 16(2) uses the expressions 'employment' and 'office under the State'. Article 16(4) refers to 'appointment' or 'posts' and to 'the services under the State'. In my opinion, the words 'employment' and 'appointment' connote two different conceptions. Appointment obviously refers to appointment to an office. The term 'Appointment' therefore implies the conception of tenure, duration, emolument and duties and obligations fixed by law or by some rule having the force of law. It is obvious that these elements are absent in the case of public employment which is a contract for a temporary purpose.

"For example, labourers or experts engaged by Government for special professional tasks under bilateral contracts would belong to the category of persons in public employment. On the contrary, persons appointed to any Government post or service are not usually employed under bilateral contracts that simply work under conditions standardized by laws and regulations. This distinction

(1) A.I.R. 1957 Pat. 617.

between public office and public employment is well recognized in American Law (See *James Hall v. State of Wisconsin* (1) and *U. S. Hartwell* (2), I think the same distinction has been imported into Art. 16 by our Constitution makers."

In the case of *James Hall v. State of Wisconsin* (1) it was observed as follows:

"The question to be considered was before us in *U. S. v. Hartwell* (2). It was there said that 'An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties . . . . A government office is different from a government contract. The latter is necessarily *limited in its duration* and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

In *U. S. v. Maurice* (3), Chief Justice MARSHALL said: 'Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer. There is an office of the Government Advocate for what used to be the old Allahabad High Court and another for the erstwhile Chief Court of Oudh. After the amalgamation of the two Courts the Government Advocate at Lucknow is known as the Additional Government Advocate. It cannot therefore be denied that there is an office of the Additional Government Advocate. That office has been described under the rules which have been framed under section

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(1) (1880) 103 U.S. 5: 26 L. Ed. 302. (2) (1868) 73 U.S. 385.  
(3) 2 Brook 96.

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241 of the Government of India Act, 1935 which deals with services, as a tenure post and classed as specialist. Rule 15 of the Rules provides that except as provided by these rules, the pay, allowances, leave and other conditions of service of a person appointed as a law officer shall be regulated by the general rules made by the Governor under clause (b) of sub-section (2) of section 241 of the Government of India Act, 1935, and pending the issue of such rules, by the rules continued in force by section 276 of the said Act and by and in accordance with the provisions of paragraph 15(2) of the Government of India (Commencement and Transitory Provisions) Order, 1936."

This rule clearly shows that for certain purposes the law officer is considered to be a government servant. Though he is not a member of any one of the regular services so as to be included in the expression "member of a civil service" to some extent, though to a limited one, he would be deemed to be in the service of the government. Inasmuch as the post of an Additional Government Advocate is an office in the nature of service (though not one of the regular public services) it must be held to be an appointment or a post. The State has got full control over the appointment to this post. I am, therefore of the opinion that it is a civil post within the meaning of Art. 311 of the Constitution of India.

The next question is whether the petitioner has been removed or dismissed from service. It does not appear that originally the government passed any order terminating the services of the petitioner. According to his affidavit the revised rule 7 was notified in the *State Gazette* on the 20th of December, 1957. In July, 1958 the petitioner heard a rumour that the State Government had requested the High Court to recommend the



names of suitable persons for appointment as Additional Government Advocate at Lucknow. Acting on that rumour the petitioner interviewed the Minister of Justice and represented to him that the new rule could have no application to his case, and then submitted a written representation. A copy of the representation that he submitted has been filed along with the affidavit and marked as Annexure IV. On 24th of September, 1958 the petitioner's representation was rejected and he was sent a letter which runs as follows:

"SIR,

In continuation of Government Order no. 2905/VII—372, dated September 10, 1958, I am directed to say that the Governor has rejected your representation for being allowed to work till April 15, 1960. It has further been decided to appoint Sri Debi Prasad Uniyal, Deputy Government Advocate, High Court, Allahabad, in your place with effect from October 1, 1958. The charge of the post may please be handed over to him.

Yours faithfully,

(Sd.) H. K. SINHA,

*Sanyukt Sachiva."*

The actual order by which his services have been terminated has not been filed in the present case. It is not possible to say without seeing that order whether it can at all amount to an order of removal or dismissal within the meaning of Art. 311 of the Constitution of India. From the facts which have been proved in the present case all that appears is that the petitioner casually came to know that the names of some persons were asked for appointment as Additional Government Advocate whereupon he made a representation saying that he was fit to discharge the duties of the Additional Government Advocate and that the new rule 7 did not apply to his case. There was therefore some difficulty in the

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way of the petitioner in establishing that he was actually dismissed or removed, but in the counter-affidavit as also during the arguments the learned Standing Counsel has admitted the position that the petitioner's services have been terminated because according to the Government the new rule 7 applied to his case and he became 60 years of age on 25th of August, 1958. Their Lordships of the Supreme Court in the case of *P. L. Dhingra v. Union of India* (1) observed as follows:

"The foregoing conclusion, however, does not solve the entire problem, for it has yet to be ascertained as to when an order for the termination of service is inflicted as and by way of punishment and when it is not. It has already been said that where a person is appointed substantively to a permanent post in government service, he normally acquires a right to hold the post until under the rules he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Art. 311(2). Termination of service of such a servant so appointed must *per se* be a punishment, for it operates as a forfeiture of the servant's rights and brings about a premature end of his employment. Again where a person is appointed to a temporary post for a fixed term of say five years his service cannot in the absence of a contract or a service rule permitting its premature termination be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and

(5) A.I.R. 1958 S.C. 36, 47 & 48.

appropriate proceedings are taken under the rules read with Art. 311(2). The premature termination of the service of a servant so appointed will *prima facie* be a dismissal or removal from service by way of punishment and so within the purview of Art. 311(2) . . . . Shortly put, the principle is that when a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and *prima facie* a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post, permanent or temporary either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment. One test for determining whether the termination of the service of a government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned the termination of his service will by itself be a punishment and he will be entitled to the protection of Art. 311. In other words and broadly speaking, Art. 311(2) will apply to those cases where the government servant, had he been employed by a private employer, will be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it in another way, if the government has, by contract,

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express or implied, or, under the rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, *prima facie* and *per se*, not a punishment and does not attract the provisions of Art. 311."

There is no rule except rule 14 of the rules under which the services of the petitioner could be terminated during the period for which he was appointed. Rule 14 authorizes the Governor to remove or suspend any law officer at any time during his term of office for misconduct or dereliction of duty subject to the provision that no law officer shall be so removed unless he had a reasonable opportunity of being heard in his defence. The learned Standing Counsel has conceded that the petitioner has not been removed under this rule. In fact that is not the case of the State even in the counter-affidavit. They have purported to act only under the new rule 7. The petitioner therefore normally had a right to remain as an Additional Government Advocate for the period of full three years for which he had been appointed. It cannot also be denied that his services have been terminated before the expiry of the three years for which he had been appointed. It would therefore appear that if the new rule 7 does not apply to his case, *prima facie*, the petitioner's removal before the expiry of the period of three years for which he had been appointed would amount to a punishment and would be a removal within the meaning of Art. 311(2) of the Constitution of India. It has been conceded by the learned Standing Counsel that before the services of the petitioner were terminated the opportunity contemplated by Art. 311 of the Constitution of India was not given to him for showing cause against the proposed order of removal. Therefore what we have to see is as to whether the new rule 7 applies to

the petitioner's case, which brings us to the consideration of the third question, i.e. whether or not that rule is retrospective. It is well established law that a new provision, except a provision relating to procedure, does not apply retrospectively unless the provision itself makes it retrospective.

It is also well established that a statute should not be so construed as to take away or extinguish the right of any person unless it appears by express words or by plain implication that it was the intention of the Legislature. Clear terms ought to be used if it is intended to divest a vested right. The new rule 7 runs as follows:

"7. *Age*—A law officer shall be appointed or re-appointed with due regard to his physical fitness, but shall not be ordinarily retained in service after attaining the age of sixty years:

Provided that the Governor may in any case retain a law officer after he has attained the age of sixty years."

To my mind there is nothing in the language of this rule to hold that the rule making authority meant to apply this rule retrospectively. Before this rule was notified, the petitioner had a clear right to continue as an Additional Government Advocate for a period of three years from 16th April, 1957, and inasmuch as there is nothing in the language of this rule which makes it retrospective in its application I am of the view that the rights of the petitioner are not affected by this rule and he had a right to continue as an Additional Government Advocate for a period of three years from 16th April, 1957. I however also make it absolutely clear that I should not be meant to be laying down that the Government had no power to make a rule which may be retrospective in its application and deprive the petitioner of

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his right of holding the post of Additional Government Advocate. I have only interpreted the rule as it stands and have held on a reading of the rule that it does not affect the rights of the petitioner. The result therefore is that the petitioner had a right to continue as Additional Government Advocate and therefore the termination of his appointment would amount to removal within the meaning of Art. 311 of the Constitution of India.

The last question that arises for consideration is whether it is possible to issue a writ of *certiorari* in the circumstances of the present case. Ordinarily in a case of this nature the proper remedy for a person like the petitioner is to file a regular suit. It was held in the case of *Union of India v. T. R. Varma* (1) as follows.

“At the very outset, we have to observe that a writ petition under Art. 226 is not the appropriate proceeding for adjudication of disputes like the present. Under the law, a person whose services have been wrongfully terminated is entitled to institute an action to vindicate his rights and in such an action, the Court will be competent to award all the reliefs to which he may be entitled, including some which would not be admissible in a writ petition.

“It is well-settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this Court in *Rashid Ahmad v. Municipal Board, Kairana* (2) the existence of an adequate legal remedy is a thing to be taken into consid-

(1) A.I.R. 1957 S.C. 882.

(2) A.I.R. 1950 S.C. 163.

deration in the matter of granting writs, *vide* also *K. S. Rashid & Son v. The Income-tax Investigation Commission* (1). And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226, unless there are good grounds therefor. None such appears in the present case. On the other hand, the point for determination in this petition whether the respondent was denied a reasonable opportunity to present his case, turns mainly on the question whether he was prevented from cross-examining the witnesses, who gave evidence in support of the charge.

"That is a question on which there is a serious dispute, which cannot be satisfactorily decided without taking evidence. It is not the practice of Courts to decide questions of that character in a writ petition, and it would have been a proper exercise of discretion in the present case if the learned Judges had referred the respondent to a suit."

In the present case however there is no dispute about facts and it has been admitted that before the services of the petitioner were terminated he was not given an opportunity of showing cause as contemplated by Art. 311(2) of the Constitution of India. That being so I am of the opinion that this is a fit case in which the petitioner should not be asked to file a regular suit and the matter should be decided in these proceedings. The question however arises as to what order should be passed on this writ petition. Inasmuch as the order terminating the petitioner's services is not on the record and it is not even definitely proved that a formal order terminating his services has actually been passed, no writ of *certiorari* can be issued quashing such an order

(1) A.I.R. 1954 S.C. 207, 210.

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even if there be one. The order dated 24th of September, 1958 (Annexure VI) has also been acted upon and has exhausted itself and the petitioner has already handed over charge of the office of Additional Government Advocate to Sri D. P. Uniyal. Therefore the mere quashing of the order dated 24th of September, 1958 will be of no help to the petitioner unless a writ of *mandamus* is also issued commanding the respondent to treat the petitioner as an Additional Government Advocate. However, I am of the opinion that an order which has exhausted itself and has served the purpose for which it was issued and does not formally terminate the petitioner's services should not be quashed. I am of the opinion that considering the nature and the circumstances of the case the proper order would be to issue a direction or writ in the nature of *mandamus*. It appears to me that the effect of Article 311 of the Constitution of India is that the Government have a statutory obligation not to remove a person who is holding a civil post without giving him a reasonable opportunity of showing cause. The petitioner had acquired a right to continue in service for a period of three years. Inasmuch as the termination of the petitioner's services has not been brought about in a manner required by Article 311 of the Constitution, the respondent has an obligation in law to treat the petitioner as continuing as an Additional Government Advocate. I would therefore allow the petition with costs and issue a writ of *mandamus* commanding the respondent to treat the petitioner as an Additional Government Advocate.

BY THE COURT:—We allow this petition with costs and issue a writ of *mandamus* commanding the respondent to treat the petitioner as an Additional Government Advocate.

*Petition allowed.*



## CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava and Mr. Justice Upadhyaya

TARA OIL AND GINNING MILLS  
(APPLICANT)

v.

COMMISSIONER, SALES TAX, U. P. LUCKNOW  
(OPPOSITE-PARTY)

United Provinces Sales Tax Act, 1948, s. 2(h) Expl. II, cl. (ii)—  
Clause, if ultra vires—Goods manufactured in Uttar Pradesh  
—Sold outside—Tax, if leviable.

Clause (ii) of the Explanation II to s. 2(h) of the United  
Provinces Sales Tax Act, 1948, is not *ultra vires* the legislature.

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Sales of goods (oils and soaps in this case) manufactured by the assessee in Uttar Pradesh and eventually sold by him in the assessment year outside the State of Uttar Pradesh are liable to be taxed by the U. P. Government as the sale of such goods must be deemed for the purposes of the Act to have taken place in U. P. wherever the delivery or contract of sale may have taken place.

*Tata Iron and Steel Co. Ltd. v. State of Bihar* (1) applied.

Civil Miscellaneous Case No. 312 of 1955, reference under section 11 of the U. P. Sales Tax Act.

The facts appear in the judgment.

The judgment of the Court was delivered by—

BHARGAVA, J. —The Judge (Revisions) Sales Tax, U. P. has referred the following two questions for opinion to this Court:

(1) A. I. R. 1958 S. C. 452.

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"1. Whether clause (ii) of the Explanation II to section 2(h) of the U. P. Sales Tax Act is *ultra vires* the Legislature ?

2. Whether in the admitted circumstances of the case, the applicants would be liable to pay tax in respect of the sales of oils and soaps in the year 1948-49 from their depot at Calcutta."

When we heard learned counsel on this reference, our attention was drawn to a number of decisions of the Supreme Court in various cases in which the provisions of the various Sales Tax Acts in force in India came up for consideration before the Supreme Court. It appears to us that it is not necessary to refer to these cases and that it is sufficient to refer to only a single case in which the Supreme Court has given its latest decision on a point which was identical with the point which arises in the present reference. That decision of the Supreme Court is in *Tata Iron & Steel Co. Ltd. v. State of Bihar* (1). In the Bihar Act also 'sale' was defined in language similar to the definition contained in the U. P. Sales Tax Act. The first question, which has been referred to us, relates to the validity of clause (ii) of Explanation II to section 2(h) of the U. P. Sales Tax Act.

Explanation II to section 2(h) of the U. P. Sales Tax Act reads as follows:

"Notwithstanding anything in the Indian Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods—

(i) which are actually in Uttar Pradesh at the time when in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(1) A. I. R. 1958 S. C. 452.

(ii) which are produced or manufactured in Uttar Pradesh by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made be deemed for the purposes of this Act to have taken place in Uttar Pradesh."

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The language of this explanation is almost identical with the language of the second proviso to the definition of 'sale' as contained in section 2(g) of the Bihar Sales Tax Act. The second proviso in the Bihar Act reads as follows:

"Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar . . . ."

It will thus be seen that clause (ii) of Explanation II to section 2(h) of the U. P. Sales Tax Act is identical in language with clause (ii) of the second proviso to section 2(g) of the Bihar Sales Tax Act. The Supreme Court in its decision, cited above, considered the validity of this provision contained in the Bihar Sales Tax Act and held that it was within the competence of the State Legislature of Bihar to enact such a provision of law. The Supreme Court laid down the principle that the power of legislation of the State Legislature under Entry 48 of List II of the Seventh Schedule to the

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Government of India Act, 1935, when imposing sales tax, was not limited to taxing sales which may have taken place within the State itself. The scope of legislative power was very extensive and sales within and outside the territory of the State could be taxed, provided there was a nexus between the transaction of sale and the taxing State. Proceeding further, the Supreme Court held that the presence of the goods at the date of the agreement for sale in the taxing State or the production or manufacture in that State of goods the property wherein eventually passed as a result of the sale wherever that might have taken place, constituted a sufficient nexus between the taxing State and the sale. In laying down this principle, the Supreme Court envisaged two types of cases and, dealing with them subsequently in the judgment, remarked—

"In the first case the goods are actually within the State at the date of the agreement for sale and the property in those goods will generally pass within the State when they are ascertained by appropriation by the seller with the assent of the purchaser and delivered to the purchaser or his agent. Even if the property in those goods passes outside the State the ultimate sale relates to those very goods."

"In the second case the goods wherein the title passes eventually outside the State, are produced or manufactured in Bihar and the sale wherever that takes place is by the same person who produced or manufactured the same in Bihar."

On this reasoning the conclusion of the Supreme Court was—

"Whatever else may or may not constitute a sufficient nexus, we are of opinion that the two cases with which we are concerned in this case are sufficient to do so."

This principle laid down by the Supreme Court with reference to the Bihar Sales Tax Act is fully applicable to the U. P. Sales Tax Act. Clause (ii) of Explanation II to section 2(h) of the U. P. Sales Tax Act covers the same field as clause (ii) of the second proviso to section 2(g) of the Bihar Sales Tax Act. The second clause of the proviso in the Bihar Sales Tax Act lays down that if the goods are produced or manufactured in Bihar, the sale of such goods must be deemed, for the purposes of the Sales Tax Act, to have taken place in Bihar wherever the delivery or contract of sale may have been made. The provision in the U. P. Sales Tax Act is exactly similar. The U. P. Sales Tax Act also only lays down that if any goods are produced or manufactured in Uttar Pradesh, the sale of such goods must be deemed, for the purposes of the U. P. Sales Tax Act, to have taken place in Uttar Pradesh wherever the delivery or contract of sale may have been made. Since the Supreme Court held that the provision contained in the Bihar Sales Tax Act was valid, it automatically follows that the similar provision of the U. P. Sales Tax Act is also valid, so that the first question must be answered in the negative.

So far as the second question is concerned, it appears to us that this must also be answered against the assessee and in favour of the department because of the principles laid down by the Supreme Court which have been reproduced above. As we have mentioned earlier, the Supreme Court when dealing with the second type of case held that the tax on sale of goods is valid if the goods, wherein the title passes eventually outside the State, are produced or manufactured in the taxing State and the sale wherever that takes place is by the same person who produced or manufactured those goods in the taxing State. In the case before us, the question, as framed, relates to sales of oils and soaps

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which were admittedly manufactured by the assessee in U. P. and which goods, according to the language of the question, were sold by the assessee from their depot at Calcutta in the year 1948-49. These goods thus are of the class mentioned by the Supreme Court in their judgment cited above. They were manufactured by the assessee in U. P. and the question of taking them has arisen on the basis that they were eventually sold by the assessee in the assessment year in question from their depot at Calcutta outside the State of U. P. In such a case the State of U. P. had power to the sale of goods to the extent of the nexus between the sale and the taxing State of U. P. in accordance with the principles laid down by the Supreme Court. Consequently, the second question must be answered in the affirmative.

As a result, we answer the first question in the negative and the second question in the affirmative. The department will be entitled to its costs from the assessee for this reference. We fix the fee of learned counsel for the department at Rs.200.

*Questions answered.*

### (FULL BENCH) APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Srivastava.*

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PANNA LAL AND OTHERS (APPELLANTS),

v.

COLLECTOR, ETAH (RESPONDENT)

**Land Acquisition Act, 1894, s. 18—Reference—Collector, power of—Rejection or refusal—Conditions, fulfilment of.**

Where an application is made to a Collector under s. 18 of the Land Acquisition Act, 1894, requiring that the matter

be referred for the determination of the Court it is open to him to reject the application and to refuse to make a reference if the required conditions have not been complied with.

Case-law discussed.

Special Appeal No. 173 of 1957, from a decision of CHATURVEDI, J. in Civil Miscellaneous Writ No. 381 of 1956 dated 14th March, 1957.

The facts appear in the judgment.

*Brij Lal Gupta*, for the appellant.

*The Standing Counsel*, for the respondent.

The judgment of the Court was delivered by—

SRIVASTAVA, J.—The appellant no. 1 was the owner of some land lying within the municipal limits of Kasganj of which the appellant no. 2 was the tenant. The land was acquired under the provisions of the Land Acquisition Act for the construction of a bus stand. The appellant no. 1 filed an objection under section 5-A of the Land Acquisition Act, but it was rejected. The Collector made his award under section 11 of the Land Acquisition Act on the 21st of July, 1954. On the 11th of August, 1955 the appellants filed an application under section 18 of the Act requiring a reference to be made to the District Judge. In this application they alleged that they had come to know of the award only on the 5th of August, 1955. By his order, dated the 3rd of November, 1955 the Collector rejected the application and refused to make the desired reference on the ground that the application was time-barred. The appellants then applied for a rehearing of the matter on the ground that it was not open to the Collector to himself consider the question of limitation and that he was bound to make the reference when an application was made to him under section 18 of the Act. This application was again rejected by the Collector on the 13th of December, 1955 on the ground that the contention put forward in it was not correct. The appellants then filed a petition under Article 226 of the Constitution in which they

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prayed that the orders of the Collector dated the 3rd of November, 1955 and the 13th of December, 1955 be quashed by a writ of *certiorari* on the ground that he had no jurisdiction to refuse to make a reference to the District Judge when he was required to do so under section 18 of the Act. The appellants also wanted the Collector to be directed by a writ of *mandamus* to make a reference to the District Judge. When the petition came up for hearing before Mr. Justice CHATURVEDI, reliance was placed in support of it by the learned counsel for the petitioners on the case of *Raja Syed Ahmad Ali Khan Alawi v. Secretary of State* (1). The learned Judge conceded that the case supported the petitioners' contention but preferred to follow the contrary view which had been expressed in *Secretary of State v. Bhagwan Prasad* (2) and *Mahadeo Krishna Parkar v. Mamlatdar of Alibag* (3). He, therefore, took the view that it was for the Collector to decide whether the application for reference was within time or not and when he found that the application was made beyond time he was bound to refuse the request for reference. As a result the petition of the appellants was dismissed. The appellants then filed this Special Appeal and in view of the fact that there was a conflict of opinion on the question raised in the appeal between this Court and the late Oudh Chief Court, the Division Bench before which the appeal came up for hearing referred the appeal to a Full Bench. That is how the case has come up before us.

The short question which therefore arises for our consideration is whether it is open to the Collector, when an application is made to him under section 18 of the Land Acquisition Act requiring that the matter be referred for the determination of the Court (District Judge), to reject the application and to refuse to make a reference.

(1) A.I.R. 1932 Oudh 180.

(2) 1932 A. I. J. 752.

(3) A. I. R. 1944 Bom. 200.



Section 18 of the Land Acquisition Act reads as follows:

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"18. (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12 sub-section (2) or within six months from the date of the Collector's award whichever period shall first expire."

Thus, though section 18 confers jurisdiction on the Collector to make a reference to the Court when required to do so it also prescribes certain conditions which must be complied with before the reference can be made. These conditions are—

- (1) a written application to the Collector
- (2) by a person who is—

(a) interested,

(b) who has not accepted the award.

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(3) the application must state the grounds of the objection and these grounds can relate only to—

- (a) measurement of the land,
- (b) amount of compensation,
- (c) the person to whom it is payable,
- (d) apportionment of the compensation among the persons interested;

(4) the application must be made within the period of time prescribed therefor under the proviso to sub-section (2) of the section.

The powers of the Collector to make the reference are therefore not unlimited. Compliance with the conditions mentioned in the section which are conditions precedent to the exercise of the power of reference is therefore necessary before that power can be invoked. In this connection it is necessary to bear in mind the observations made by their Lordships of the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynooden Khan* (1):

“Wherever jurisdiction is given to a Court by an Act of Parliament or by Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise.”

Before exercising the jurisdiction conferred upon him by the section therefore, the Collector is bound to see whether the required conditions have been complied with, and if they have not been complied with, he cannot exercise the jurisdiction. The making of the application within the prescribed time being one of the

(1) (1855) 6 M. I. A. 134, 155.

conditions laid down in the section itself, if the application is not made within time, the Collector can in our opinion, reject the application as incompetent and refuse to make the reference. Section 18 does not make the Collector a mere automatic transmitting authority bound to make the reference when required to do so without going into the question whether the requirements of the section have been complied with or not. In fact, so far as the application for making a reference under section 18 of the Act is concerned, the Collector appears to be the only authority who has anything to do with it. It will be noted that he is not bound to send the application along with the reference when he makes it. The only thing he has to do is to submit a statement containing the particulars prescribed by section 19. Those particulars do not include any facts relating to the conditions (including limitation) required in respect of the application under section 18. There is therefore nothing to show that the Collector is not expected to apply his mind to the question whether the application fulfils the requirements of the law and that he is bound to refer the case simply on an application being made even though it is not in accordance with law. The contention of the appellants that the Collector could not go into the question of limitation and had no jurisdiction to reject the application on the ground that it was time-barred, thus appears to us to be wholly untenable.

In the case of *Raja Syed Ahmad Ali Khan Alawi v. Secretary of State* (1) on which great reliance is placed on behalf of the appellants, an application was made to the Collector under section 18 of the Land Acquisition Act and was rejected on the ground that it was time-barred. Against the order of the Collector an application was made to the Chief Court under section

(1) A. I. R. 1932 Oudh 180.

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115 of the Civil Procedure Code. A preliminary objection was raised that in rejecting the application the Collector had not acted as a Court and the order sought to be revised was not a judicial order. The contention was that section 115 of the Civil Procedure Code was not applicable at all. The contention was rejected and the view taken was that the order of the Collector was a judicial order of a Court subject to the revisional jurisdiction of the High Court. In that connection it was observed:

"The Land Acquisition Officer has no jurisdiction to refuse to make the reference even if in his opinion the application is not in time under clause (a) or clause (b) or sub-section (2), section 18. He should express that opinion and refer the matter to the Court for determination. The section nowhere provides that if the application contravenes clause (a) or clause (b), the Land Acquisition Officer shall reject the application. These clauses are placed in the section by way of a proviso to the substantive enactment contained in sub-section (1), section 18 of the Act and relate to the form of the application and do not have the effect of taking away the right given by the substantive enactment to an interested person who has not accepted the award of requiring that the matter be referred for the determination of the Court."

Reliance was placed in support of this view on a note added to rule 436 framed by the Local Government under the Land Acquisition Act.

With great respect the reasoning, in our opinion, ignores that the proviso to sub-section (2) of section 18 prescribes a condition of limitation which must be fulfilled before the application can be entertained by the Collector under sub-section (1). If the condition is not complied with, the application is not a competent

application and cannot succeed. It was therefore not required to be stated anywhere in so many words that the Collector shall reject the application if the proviso is contravened. As was observed by the Full Bench of the Calcutta High Court in *Khassidas Gangaram v. First Land Acquisition Collector* (1): The section does not say that it is for the Collector to see if these conditions have been satisfied, nor that, if they are not satisfied, he may reject the application. But we think these powers are implied. Nor can it be said that the proviso takes away the right given by sub-section (1). The right is there, but is subject to the conditions laid down in the proviso and can only be exercised if the conditions are fulfilled. We are therefore unable to accept the interpretation put by the Oudh Court on the section as correct.

A number of cases were referred to at the Bar, but it does not appear to be necessary to discuss them. The specific question which is now before us does not appear to have arisen in any of them. Most of the cases deal with the question whether after a reference has been made by the Collector under section 18 of the Land Acquisition Act its competency or *vires* can be questioned before the Court. Some of them deal with the question whether an order of the Collector making or refusing to make the reference can be questioned either under the writ jurisdiction of the High Court or under its revisional jurisdiction under section 115 of the Civil Procedure Code. We are not concerned with those questions at present. There are, however, observations made in *Secretary of State v. Bhagwan Prasad* (2), *Secretary of State v. Bhagwan Prasad* (3), *C. Ravunny Nair v. State* (4), *Kana Navanna Narayanappa Naidu v. Revenue Divisional Officer* (5), *Hari Krishna v. State of Pepsu and* (6), *Mahadeo Krishna*

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(3) A. I. R. 1952 All. 597.

(5) A. I. R. 1955 Mad. 23.

(2) A.I.R. 1929 All. 769.

(4) A. I. R. 1954 Mad. 444.

(6) A. I. R. 1958 Punj. 490.

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*Parkar v. Mamlatdar of Alibag* (1) which support the view we are taking on the question which has arisen in the present case.

CHATURVEDI, J. was therefore, in our opinion, justified in rejecting the contention of the appellants that the Collector was bound to make the reference as required by them and had no power to reject the application even though it did not comply with the conditions laid down under section 18 of the Land Acquisition Act. The petition of the appellants was thus rightly dismissed and the appeal must fail. It is accordingly dismissed with costs.

*Appeal dismissed.*

### (FULL BENCH) APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,  
 Mr. Justice Dayal and Mr. Justice Srivastava.*

DISTRICT BOARD, ALLAHABAD  
 (APPLICANT)

v.

SYED TAHIR HUSAIN AND OTHERS  
 (OPPOSITE-PARTIES)

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*Constitution of India, 1950, Art. 133- Leave to appeal to Supreme Court—Petition in general terms not entertainable—specification of provision necessary—Civil Procedure Code, 1908, O. XLV, r. 3(1).*

A prayer in general terms for a certificate for leave to appeal to the Supreme Court under Art. 133 of the Constitution of India does not comply with the rules and is defective and not entertainable. In view of rule 3(1) of O. XLV of the Civil Procedure Code, 1908, a petition under Art. 133(1) of the Constitution of India must contain, in addition to stating the grounds of appeal, a prayer which clearly states the provision or provisions of that Article under which a certificate is asked for.

*Azimunnissa v. Assistant Custodian, Evacuee Properties, Deoria* (1) referred to.

Supreme Court Appeal No. 66 of 1958.

The facts appear in the judgment.

*Krishna Shanker*, for the applicant.

Standing Counsel *Bashir Ahmad* and *Jagdish Saroop*  
for the respondents.

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The judgment of the Court was delivered by—

MOOTHAM, C.J.:—An application for leave to appeal to the Supreme Court under Articles 132 and 133 of the Constitution came on for hearing before a Bench of this Court on the 27th January, 1959. A preliminary objection was then taken on behalf of the respondents that the application, so far as it was for a certificate under Article 133, was defective and could not be entertained by the Court as the applicant had failed to state in his prayer the specific clause or clauses of Article 133(1) under which he asked for a certificate; and reliance was placed upon the unreported decision of DESAI and BEG, JJ., in *Azimunnissa v. The Assistant Custodian, Evacuee Properties, Deoria* (1). The Bench was of opinion that the preliminary objection raised a question of practical importance which it was desirable should be considered by a larger Bench.

The application was for leave to appeal to the Supreme Court from an order of this Court dated the 4th December, 1957, dismissing an appeal from an order of Mr. Justice RAGHUBAR DAYAL dated the 23rd March, 1955, allowing a petition under Article 226 of the Constitution. The application contained a statement of the relevant facts in narrative form. It then enumerated ten grounds upon which leave to appeal was sought and concluded with a prayer which reads thus:

“It is therefore most respectfully prayed that this Hon’ble Court may be pleased to certify that

(1) Supreme Court Appeal No. 68 of 1957, decided on 15th November, 1957.

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this is a fit case for appeal to the Supreme Court under Articles 132 and 133 of the Constitution."

In *Azimunnissa's* case (1) the prayer was that "the Court be pleased to certify that the case was a fit one for appeal to the Supreme Court" and it is clear that leave was in fact sought on the ground that the case was a fit one for appeal within the meaning of clause (c) of Article 133(1). The Court refused to grant a certificate on that ground whereupon learned counsel for the applicants asked the Court to grant a certificate on the ground that the order against which leave to appeal was sought involved directly or indirectly some claim or question respecting property of the value of not less than Rs.20,000. The Court declined however to do so as not only was there no assertion in the application that the order involved a claim on question respecting property of that value but that there was no prayer, express or implied, for the grant of such a certificate.

We are of opinion that the question which has been referred to this Court can be disposed of very shortly. If the application which arises out of an order made in exercise of the Court's powers under Art. 226 of the Constitution is an application which is governed by the provisions of the Code of Civil Procedure then rule 3(1) of Order XLV applies *proprio vigore*: if the application is not governed by the provisions of the Code rule 26 of Chapter XXIII of the Rules of Court comes into play, and this rule provides that in all such cases the provisions of Order XLV shall, so far as may be, and with such adaptations and modifications as may be found necessary, apply.

Now rule 3(1) of Order XLV which deals with appeals to the Supreme Court, provides that—

"(1) every petition shall state the grounds of appeal and pray for a certificate either that, as

(1) Supreme Court appeal no. 68 of 1957, decided on 15th November, 1957.



regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to the Supreme Court."

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The requirements of section 110 are that—

"the amount or value of the subject-matter of the suit in the Court of first instance must be twenty thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to the Supreme Court must be the same sum or upwards,

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or the judgment, decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the judgment, decree or final order appealed from affirms the decision of the Court immediately below the Court passing such judgment, decree or final order, the appeal must involve some substantial question of law."

These requirements are embodied in clauses (a) and (b) and the concluding sentence of Article 133(1); the alternative requirement of Order XLV, rule 3(1) that the case is otherwise a fit one for appeal is embodied in clause (c) of Article 133(1).

In our opinion the plain meaning of rule 3(1), Order XLV in its application to a petition under Article 133(1) is that the petition, in addition to stating the grounds of appeal, must contain a prayer which clearly states the provision or provisions of that Article under which a certificate is asked for. A prayer in general terms for a certificate under Article 133 does not in our judgment comply with the rule, and we are accordingly of opinion that the prayer in the present case, in so far

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as a certificate is asked for under that Article, is defective; and that unless and until it is amended the application for a certificate under this Article is not entertainable. We answer the reference accordingly.

*Reference answered.*

### (FULL BENCH) APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Srivastava*

KUNDAN SUGAR MILLS, AMROHA  
(DEFENDANT)

*v.*

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THE INDIAN SUGAR SYNDICATE LTD.  
AND OTHERS (PLAINTIFFS)

**Code of Civil Procedure, 1908, O. XXXIII, r. 1—***Forma pauperis... 'Person'—Limited Company, if can file cross objection in forma pauperis.*

A limited company is a "person" within the meaning of the expression in the explanation to r. 1 of O. XXXIII of the Code of Civil Procedure, 1908 and can file a cross-objection in *forma pauperis* if other requirements of the law are satisfied.

Case-law discussed.

Miscellaneous Application No. 3816 of 1957 in First Appeal No. 333 of 1957.

The facts appear in the judgment.

*S. N. Verma*, for the appellant.

*Jagdish Swarup*, for the respondents.

**MOOTHAM, C.J.:**—I have had the advantage of reading the order prepared by **SRIVASTAVA, J.** I agree with the conclusion at which he has arrived for the reasons stated by him.

**DAYAL, J.:**—This is an application under Order XLIV rule 1 of the Code of Civil Procedure for filing a cross-

objection in *forma pauperis* in First Appeal No. 333 of 1957. The applicant is the Indian Sugar Syndicate Limited (in voluntary liquidation) through its Liquidators four in number. Notice of the application was issued to the appellant, Kundan Sugar Mills, Amroha. A preliminary objection has been taken on behalf of the appellant to the effect that the provisions of Order XXXIII of the Civil Procedure Code do not apply to a limited company.

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Order XXXIII of the Civil Procedure Code deals with suits by paupers. Its rule 1 is:

"1. *Suits may be instituted in forma pauperis*—Subject to the following provisions, any suit may be instituted by a pauper.

*Explanation*—A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit."

Rule 3, as amended by this Court, is:

"3. Notwithstanding anything contained in these rules the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court or detained in prison, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person."

It is contended for the appellant that a limited company cannot possess wearing apparel and cannot present an application in person and that therefore compliance of rules 1 and 3 is not possible and that consequently

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it must appear that a limited company is not covered by the expression "person" in the Explanation to rule 1.

I do not agree with this contention.

The word "person" is not defined in the Civil Procedure Code. In view of clause (39) of section 3 of the General Clauses Act the word "person" in the Explanation to rule 1 of Order XXXIII of the Code would include a company unless there be anything repugnant in the context of the provisions of Order XXXIII which deal with suits by paupers. If there be nothing repugnant in those provisions a limited company would be covered by the word "person" and therefore can sue as a pauper.

Rule 1 of Order XXXIII allows the institution of any suit by a pauper. There is nothing in the Explanation to this rule which would make it impracticable or impossible for a company to institute a suit as a pauper when a fee is prescribed for its plaint. The company can also be covered by the definition of the word "pauper" with respect to a suit for whose plaint no fee is prescribed as in such a case a person is a pauper when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit. The mere fact that the wearing apparel is not to be taken into consideration in evaluating property does not mean that it must necessarily be possessed by a person who wants to institute a suit as a pauper and that one who does not possess any wearing apparel cannot be a pauper.

It is true that a company cannot present an application for permission to sue as a pauper in person, but that is not an insurmountable difficulty or a circumstance which makes it repugnant that the word "person" in the Explanation to rule 1 should include a company.

An applicant can be exempted from appearing in Court. The exemption may be specifically laid down in the statute or it may be granted by the Court. Sections 132 and 133 of the Civil Procedure Code mention persons who are exempted from personal appearance in Court. This Court has by amendment of rule 3 also allowed persons detained in prison to present applications for permission to sue in *forma pauperis* through authorized agents. There is nothing in this rule or in any other provision which bars a Court from exempting an applicant from appearing in Court. In this connection a reference to section 404 of the Civil Procedure Code of 1882 is helpful. That section corresponds to the present rule 3 of Order XXXIII of the Code. Section 404 is:

“Notwithstanding anything contained in section 36, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court under section 640 or section 641, in which case the application may be presented by a duly authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.”

Sections 640 and 641 of the Code of Civil Procedure, 1882 correspond to sections 132 and 133 of the present Code. Section 404 therefore meant that only those persons who were exempted from personal appearance under sections 640 and 641 could apply for permission to sue in *forma pauperis* through authorized agents. Any person exempted by the Court from appearing in Court could not have presented such an application through an authorized agent. The change in rule 3 of Order XXXIII of the Code therefore makes the rigour

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of the rule less stringent. It is contended for the appellant that a Court can exempt a person only when it be possible for that person to appear in person in case exemption is not granted. There is no such restriction in the language of rule 3. Exemption may be granted to a person who can otherwise appear. It can also be granted to a person who be incapable of appearing. In fact the exemption should be given to the latter person more readily. He is not to suffer on account of his physical inability to appear in person when he is entitled to rights and subject to liabilities under the general law. In the absence of any strong reasons it is not to be presumed that the law makes a discrimination in his case and does not allow him to approach the Court for redress in case he is unable to pay the court-fee. The inability of a party to appear in person does not in any way affect adversely the merits of the determination of the rights of the parties which is the primary object for the establishment of courts of justice. When different provisions of the law must in the nature of things provide for a company or any person not capable of appearing in Court to institute suits or to take other steps in connection with litigation through someone who can appear in Court and take steps, there seems to be no sufficient reason for thinking that such a person would be deprived of presenting an application for permission to sue in *forma pauperis* through such agency. The sole object behind the provision for the applicant presenting an application in person is that the Court be able to examine him in connection with the material questions relating to the application. If any other person can serve that purpose equally well, the object of this rule is achieved. The rule itself allows presentation of an application by an authorised agent in certain circumstances and thus clearly indicates that personal presentation of the application is not of such signi-

fiance that if personal appearance is not possible by an applicant he be debarred from suing as a pauper.

I am therefore of opinion that there is nothing in the provision of rule 1 or rule 3 of Order XXXIII of the Code which on account of repugnancy makes the definition of the word "person" in the General Clauses Act inapplicable to the word "person" in the Explanation to rule 1 of Order XXXIII of the Code. This view finds support from the cases of *Perumal Goundan v. T. J. D. Sangha Nidhi* (1), *Shree Shankarji Maharaj v. Mst. Godavaribai* (2), *Swaminathan v. Official Receiver Ramnad* (3), *Sripal Singh v. U. P. Cinetone Ltd.* (4), *Syed Ali v. The Deccan Commercial Bank Limited* (5) and *Prabhulal v. Imamuddin* (6).

In *Nagpur Electric Light & Power Co. Ltd. v. K. Shreepathirao* (7) the interpretation of rule 1 of Order XXXIII of the Code by the Madras High Court in *Perumal Goundan v. T. J. D. Sandha Nidhi* (1) was approved and the same rule of construction was applied by the Supreme Court in interpreting the provisions of a certain standing order. This case finally sets at rest that the non-possession of wearing apparel by a company does not take it out from the definition of the word "person".

The learned counsel for the appellant relied on the cases of *S. M. Mitra v. Corporation of the Royal Exchange Assurance* (8), *Bharat Abhyudoy Cotton Mills Ltd. v. Maharajadhiraj Sir Kameshwar Singh* (9) and *Associated Pictures Limited v. The National Studios Limited* (10).

The case of *S. M. Mitra v. Corporation of the Royal Exchange Assurance* (8) did not consider the earlier case of *D. K. Cassim & Sons v. Abdul Rahman* (11)

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(1) (1918) I.L.R. 41 Mad. 624.

(3) A.I.R. 1937 Mad. 549.

(5) A.I.R. 1951 Hyd. 124.

(7) A.I.R. 1958 S.C. 658.

(9) A.I.R. 1938 Cal. 745.

(11) A.I.R. 1930 Rang. 272.

(2) A.I.R. 1935 Nag. 209.

(4) A.I.R. 1944 Oudh 248.

(6) A.I.R. 1955 NUC (Raj.) 4030.

(8) A.I.R. 1930 Rang. 259.

(10) A. I. R. 1951 Punj. 447.

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which held that a firm can be considered to be a person under Order XXXIII, rule 1. The case is distinguishable. OTTER, J. himself distinguished the case of *Perumal Goundan v. T. J. D. Sangha Nidhi* (1) which allowed the liquidator of a company to sue in *forma pauperis* if the company could be held to be a pauper. He also distinguished the case of *Venkatanarasaya v. Achemma* (2) where a minor was allowed to sue as a pauper through a next friend who himself was not a pauper. OTTER, J. expressed himself thus at page 262 :

“Further, as was pointed out by the learned Judge of the original side, the question for us is not whether the word ‘person’ covers an individual in capacities other than his personal capacity, but whether upon a consideration of the provisions of the order of the Code relating to pauper status the word ‘person’ should be held to refer to a person who is not in fact a pauper.”

He was considering the case of a suit instituted by a receiver appointed in insolvency proceedings and considered that a receiver gets vested with the rights of the insolvent in the insolvent's property and as such institutes a suit as an owner. Further, he observed :

“In the present case, however, it seems to us from an examination of Order XXXIII and of the rules thereunder that the whole matter is one personal to the applicant. It is the applicant's means, of course, that have to be considered, it is the applicant in person who presents his application and so on. . . . We agree that the word ‘person’ in the provision under review must be considered in its ordinary and plain meaning, and we see nothing in the context in which it stands to indicate that

(1) (1918) I.L.R. 41 Mad. 624.

(2) (1878—1881) I.L.R. 3 Mad. 3.



the legislature meant that the word 'person' should or might have the meaning of a juridical person."

With respect, it appears to me that the last observation makes a wrong approach to the question whether the word "person" in a certain context includes a juridical person or not. The context is not to indicate that the word "person" should have the meaning of a juridical person but it should indicate that the word "person" should not have such a meaning. It is only then that the context would create such a repugnancy as would make nonapplicable the definition of the word "person" in the General Clauses Act. Lastly he observed:

"The real point seems to us to be that a receiver takes the place of an insolvent and sues in respect of what in law are for the time being his own interests. He acts in a personal capacity throughout."

It is in view of such capacity of the receiver in instituting a suit that OTTER, J. held that the person to be considered is the person actually applying and no other person and that the receiver must be considered from his personal point of view and not from any representative point of view.

In the case of *Bharat Abhudoy Cotton Mills Ltd. v. Maharajadhiraj Sir Kameshwar Singh* (1) a company wanted to appeal in *forma pauperis*. This case followed the case of *S. M. Mitra v. Corporation of the Royal Exchange Assurance* (2) and considered the company's not possessing necessary wearing apparel and its inability to be present in person sufficient for the non-application of the definition of the word "person" in the General Clauses Act. With respect, I differ from the view expressed.

In the case of *Associated Pictures Ltd. v. The National Studios Limited* (3) too a company wanted permission

(1) A.I.R. 1938 Cal. 745.

(2) A.I.R. 1930 Rang. 259.

(3) A. I. R. 1951 Punj. 447.

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to sue in *forma pauperis*. FALSHAW, J. considered the question so obvious that he held that the company was not covered by the word "person" in the Explanation to rule 1 and relied on the aforesaid Rangoon and Calcutta cases cited for the appellant.

For the reasons stated above I repel the preliminary objection and hold that the applicant company comes within the expression "person" in the Explanation to rule 1 of Order XXXIII of the Code and can file a cross-objection in *forma pauperis*, if other requirements of the law are satisfied.

SRIVASTAVA, J.:—In First Appeal No. 333 of 1957 Kundan Sugar Mills, Amroha, is the appellant. One of the respondents is the Indian Sugar Syndicate Limited in voluntary liquidation. The Indian Sugar Syndicate Limited sought the permission of this Court for filing a cross-objection in *forma pauperis*. When notice of the application was given to the appellant a preliminary objection was raised and it was urged that it was not open to a limited company to take advantage of the provisions of Order XXXIII of the Civil Procedure Code and to file a cross-objection in *forma pauperis*. The point being of some importance and judicial opinion in respect of it being conflicting the Division Bench before which the preliminary objection was raised has referred the question to a Full Bench.

The short question which has to be considered therefore is whether the benefit of the provisions of Order XXXIII of the Code of Civil Procedure can be extended to limited companies.

Rule 1 of Order XXXIII reads as follows:

"Suits may be instituted in *forma pauperis*—  
Subject to the following provisions, any suit may be instituted by a pauper.

*Explanation*—A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit. Rule 3 of the Order as amended by this Court is as follows:

"3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court or detained in prison, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person."

The main ground urged on behalf of the respondent in support of the contention that a limited company can also sue as a pauper is that the Explanation of rule 1 of Order XXXIII of the Code of Civil Procedure makes that rule applicable to all persons. The word "person" has not been defined in the Civil Procedure Code itself. Under clause 39 of section 3 of the General Clauses Act an incorporated company would be included in the word "person" unless there is anything repugnant in the context in which the word is used. In the Order XXXIII of the Civil Procedure Code there is nothing to show that the intention was to exclude artificial persons like limited companies from the benefit of that order. In support of this contention reliance is placed on the cases reported in *Perumal Goundan v. T. J. D. Sangha Nidhi* (1), *Shree Shankarji Maharaj v. Mst. Godavaribai* (2), *Swaminathan v. Official*

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*Receiver Remnad* (1), *Sripal Singh v. U. P. Cinetone Ltd.* (2) *Syed Ali v. The Deccan Commercial Bank Limited* (3) and *Prabhulal v. Imamuddin* (4).

The reply of the appellant, on the other hand, is that the meaning attributed to the word "person" in the General Clauses Act can apply only if there is nothing repugnant in the context. A perusal of rules 1 and 3 of Order XXXIII of the Civil Procedure Code, it is pointed out, will show clearly that the word "person" as used in rule 1 could not have been intended to include artificial persons, like limited companies. It is pointed out in particular that under the Explanation added to rule 1 the value of the necessary apparel of the person who is seeking to sue as a pauper has to be excluded when considering the question whether he is possessed of sufficient means to enable him to pay the fee prescribed for the plaint. Rule 3 of Order XXXIII, it is stressed, requires that the application to sue as *forma pauperis* must be presented by the applicant in person. It is contended that a limited company cannot have any wearing apparel, nor is it possible for it to present an application in person. These considerations, it is urged, show that in the context in which the word "person" has been used in the Explanation to rule 1 it cannot be considered to be wide enough to include artificial persons. The learned counsel for the respondent sought support for his contention from the cases, reported in *S. M. Mitra v. Corporation of the Royal Exchange Assurance* (5), *Bharat Abhyudoy Cotton Mills Ltd. v. Maharajadhiraj Sir Kameshwar Singh* (6) and *Associated Pictures Limited v. The National Studios Limited* (7).

The question is by no means free from difficulty. But in view of the observations made by their Lord-

(1) A.I.R. 1937 Mad. 549.

(2) A.I.R. 1951 Hyd. 124.

(3) A.I.R. 1930 Rang. 259.

(4) A.I.R. 1944 Oudh 248.

(5) A.I.R. 1955 N.U.C. (Raj.) 4030.

(6) A.I.R. 1938 Cal. 745.

(7) A.I.R. 1951 Punj. 447.

ships of the Supreme Court in the recent case of *Nagpur Electric Light & Power Co. Ltd. v. K. Shreepathirao* (1) I feel that the respondents contention must be preferred to that of the appellant. In the case before the Supreme Court the question was whether the respondent K. Shreepathirao was an employee within the meaning of the term as was defined in Standing Order No. 2. That order provided in its definition clauses:

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"In these orders, unless there is anything repugnant in the subject or context—

(a) "employees" means all person male or female, employed in the office or Mains Department of Stores or Power House or Receiving Station of the Company, either at Nagpur or at Wardha whose names and ticket numbers are included in the departmental musters."

No ticket had been issued to the respondent K. Shreepathirao. He therefore contended that he did not fall within the definition of the term "employees" as given in the Standing Order because that definition could apply only to those persons to whom tickets had been issued. On behalf of the company however it was urged that even the definition clause had to be interpreted in accordance with the context or the subject, and if that was done the words "whose names and ticket numbers are included in the departmental musters" used in the definition clause must be read as those "whose names and ticket numbers, if any, are included in the departmental musters." The contention of the company was accepted.

The rule of interpretation which was employed was that though every word occurring in a statute should be given its proper meaning and weight it could not be overlooked that the meaning was derived from the

(1) A. I. R. 1958 S. C. 658.

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context or the subject. This rule, it was pointed out, had been employed in the case of *Perumal Goundan v. T. J. D. Sangha Nidhi* (1), where a company had been held entitled to the benefits of Order XXXIII, rule 1 of the Code of Civil Procedure even though it could not be a person who could possess wearing apparel. The line of reasoning suggested on behalf of the respondent in present case was thus approved by their Lordships of the Supreme Court. It follows by implication that the narrower interpretation of Order XXXIII, rule 1, Civil Procedure Code put forward on behalf of the appellant in its preliminary objection must be rejected as unacceptable. A limited company can therefore take advantage of the provisions of Order XXXIII if it otherwise fulfils the necessary requirements. The preliminary objection raised by the appellant must therefore be overruled.

BY THE COURT:—We therefore overrule the preliminary objection and hold that a limited company can take advantage of the provisions of Order XXXIII of the Code of Civil Procedure if it otherwise fulfils the necessary requirements.

*Application allowed.*

### (FULL BENCH) CIVIL REFERENCE

*Before the Honourable O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Srivastava*

RAJ SACHDEVA (APPLICANT)

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v.

### BOARD OF REVENUE (OPPOSITE-PARTY)

Indian Stamp Act, 1899, s. 57, Sch. I-B, Art, 5(c) Reference  
—Indian Companies Act, 1936, s. 75(2)—Particulars filed in  
prescribed form—Agreement—Not conveyance.

(1) (1918) I.L.R. 41 Mad. 624.

An oral agreement was entered into between R S, proprietor of a business carried on under the name of Globe Travels with a company newly incorporated under the name of Messrs Globe Travels (Private) Ltd. of which R S became the Managing Director whereunder the former agreed to transfer his business to the company in consideration of the allotment of fully paid up 720 shares to him which was done and pursuant to s. 75(2) of Indian Companies Act, 1956, particulars of the contract in the prescribed form were filed with the Registrar bearing a stamp of Rs.2 as an agreement under Art. 5(c) of Schedule I-B to the Indian Stamp Act as in force in this State. The question arose as to whether the document filed is a mere agreement or a conveyance chargeable under Art. 23 of Schedule I-B.

*Held*, that, the particulars filed by the company were duly stamped inasmuch as the contract which was admittedly made was only an agreement to transfer in future.

Civil Reference No. 260 of 1958 under section 57 of the Indian Stamp Act.

The facts appear in the judgment.

*R. S. Pathak*, for the applicant.

*N. D. Pant*, for the opposite-party.

*MOOTHAM, C. J.*:—This is a reference made to this Court by the Chief Controlling Revenue Authority under section 57 of the Indian Stamp Act.

The circumstances in which the reference is made are these. Sri Raj Sachdeva was the proprietor of a business carried on under the name of Messrs. Globe Travels. A company was incorporated under the Indian Companies Act under the name of Messrs. Globe Travels (Private) Limited, of which Sri Raj Sachdeva was the Managing Director. In 1955 an oral agreement appears to have been entered into between Sri Raj Sachdeva as proprietor of Messrs. Globe Travels and the company where under the former agreed to transfer his business to the company in consideration of the allotment of fully paid shares. An allotment of 720 shares was made to Sri Raj Sachdeva on the 5th April, 1955. Thereafter the company on the 11th January, 1956, filed with the Registrar, pursuant to section 75(2) of

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the Indian Companies Act, 1956, particulars of the contract in the prescribed form. That form was signed by Sri Raj Sachdeva as a Director of the company and bore a stamp of Rs.2, as an agreement under Art. 5(c) of Schedule I-B to the Indian Stamp Act, as in force in this State.

The question referred to this Court is—

“Whether the document dated 11th January, 1956, executed by Sri Raj Sachdeva is a mere agreement chargeable with a duty of Rs.2 under Article 5(c) of the Stamp Act as amended in its application to Uttar Pradesh, or it is in the nature of a conveyance within the meaning of section 2(10) of the Act, chargeable under Article 23, Schedule I-B of the Act with a duty of Rs.15,912.”

The question is not very accurately framed for the question is not whether the document of the 11th January, 1956, is an agreement but whether the prior oral contract the particulars of which are specified in that document would have been chargeable with duty as an agreement or as a conveyance had it been reduced to writing. The Board of Revenue which is the Chief Controlling Revenue Authority, was inclined to the view that the document was duly stamped, but as it entertained some doubt with regard to the matter it thought it proper to make this reference.

Now section 104 of the Companies Act, 1913, so far as is material, reads thus:

“(1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter—

(a)

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination



of the Registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and filed with the Registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted; and

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(2) Where a contract such as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the Registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the "contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the Registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act."

The section requires evidence of the title of the allottee to the allotment being placed upon the register, and where that evidence is to be found in a contract in writing, that contract together with any contract of sale, or for services, or other consideration in respect of which the allotment is made, must be produced for the inspection of the Registrar and duly verified copies filed. Where however, the contract constituting the title of the allottee is not in writing, then, under sub-section (2) the prescribed particulars of that contract must be filed, and these particulars must bear the same stamp

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duty which would have been payable if the contract had been reduced to writing. .

Now in the present case it is not in doubt that the transfer of the assets and *liabilities* of the business to the company was effected by delivery and the only question is whether such delivery was given in pursuance of the oral contract for sale or was part and parcel of some subsequent oral contract of sale. There is however no suggestion in the order of reference that there had been in fact any such contract of sale. The vendor did not own any immovable property and the law does not require that a transfer of movable property should be made by an instrument in writing. If the parties choose to transfer such property by delivery pursuant to a contract for sale they are free to do so. In the present case no deed of conveyance was executed, and the particulars furnished were in my opinion the particulars of the agreement for sale which preceded the completion of the purchaser's title by delivery. Had that agreement been reduced to writing it would have been chargeable with duty under Art. 5(c) of Schedule I-B to the Stamp Act and I am therefore of opinion that the particulars filed by the company under section 104 (2) of the Companies Act were duly stamped. I would therefore, answer the reference accordingly.

DAYAL, J.:—I have read the opinion expressed by my Lord the Chief Justice on the question referred for decision and agree with the answer proposed and the reasons stated for the answer.

SRIVASTAVA, J.:—This is a reference under section 57 of the Indian Stamp Act. The question referred to us by the Board of Revenue is this:

“Whether the document dated January 11, 1956, executed by Sri Raj Sachdeva is a mere agreement chargeable with a duty of Rs.2 under Article 5(c) of the Stamp Act as amended in its application to

Uttar Pradesh, or it is in the nature of a conveyance within the meaning of section 2(10) of the Act, chargeable under Article 23 Schedule I-B of the Act with a duty of Rs.15,912."

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It appears that Sri Raj Sachdeva was the proprietor of a business carried on in the name of Messrs Globe Travels. Later a company was incorporated under the Indian Companies Act. It was called Globe Travels (Private) Limited, and Sri Raj Sachdeva became its Managing Director. In 1955 an agreement was entered into between Sri Raj Sachdeva as proprietor of the private firm Messrs Globe Travels and the incorporated company according to which the former agreed to transfer his business to the company in consideration of the allotment of 720 fully paid up shares of the company. On the 5th of April, 1955 the company allotted 720 fully paid up shares to Sri Raj Sachdeva. Thereafter on the 13th April, 1955 the company passed the following resolution:

"Resolved unanimously that the firm Messrs Globe Travels, New Delhi be purchased as a going concern with all its assets and liabilities as on 31st March, 1955, including its cash in hand and bank balance with effect from 1st April, 1955 from its proprietor Mr. Raj Sachdeva who is also the Managing Director of the company on such terms and conditions, as may be decided by the Directors.

On the 11th of January, 1956, a form known as particulars of oral contracts was filed by Sri Raj Sachdeva with the Registrar of Companies as required by section 104 of the Companies Act, 1913. According to this document the concern known as Messrs Globe Travels was taken over by the company for a consideration of Rs.6,63,000, which was paid in the following manner:

- (i) Allotment of 720 shares at Rs.100 each, Rs.72,000.

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(ii) Cash Payment, Rs.27,550.

(iii) Liabilities of the firm taken over by the company Rs.5,63,450.

The form was signed by Sri Raj Sachdeva as Director of the company and a stamp duty of Rs.2 was paid in respect of it as it was treated as an agreement under Article 5(c) of Schedule I-B to the Indian Stamp Act, as applicable to the Uttar Pradesh. A question arose whether the document had been correctly stamped or whether it was liable to be stamped as a conveyance [as defined in section 2(10) of the Stamp Act] with duty payable under Article 23 of the Schedule. The Board was inclined to the view that the document had been correctly stamped but in view of the conflicting arguments advanced before it, it has referred the question to this Court.

The relevant portion of section 104 of the Companies Act of 1913 reads as follows:

"104. (1) Whenever a company . . . . . makes any allotment of shares, the company shall within one month thereafter, file—

(a) . . . . .

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash produce for the inspection and examination of the Registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale . . . . . such contracts being duly stamped. . . .

(2) Where such a contract as above mentioned is not reduced to writing the company shall within one month of the allotment, file with the Registrar prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and these

particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act.

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The obvious intention of the section appears to be that in any case where shares are allotted for consideration other than cash the Registrar must have before him the evidence of the title of the allottee to the allotment. If the contract constituting the title is in writing that writing itself must be produced. If it is oral the full particulars of the oral contract must be filed. If the contract in writing constituting the title to the allotment is preceded by any other contract of sale or of service which is the consideration for the contract constituting the title that earlier contract or its particulars must also be filed. It is therefore clear that as contemplated by section 104(1) (b) the title of the allottee to the allotment can be constituted only by a contract and cannot be constituted in any other way. The contract may be in writing or may be oral. In case it is in writing the writing itself must be produced. If the contract is oral its particulars must be filed. It is not necessary that in every case there should be an earlier contract of sale or service, but if there is one that contract too if it is in writing and its particulars if it is oral must be produced.

It is noticeable that it is not the earlier contract referred to in section 104(1) (b) which is the contract constituting the title of the allottee to the allotment. That earlier contract is only a contract of sale or service which by itself does not create any title. The primary thing required by the section to be filed is therefore the contract constituting the title of the allottee to the allotment and not the earlier contract because it is not necessary that in every case there must have been such a preceding contract.

Sub-section (2) of section 104 creates a legal fiction. If the contract constituting the title of the allottee to the allotment is in writing it must be stamped. If,

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however, it is not in writing and is only oral its particulars have to be filed in a prescribed form. That form is in law to be deemed for the purposes of stamp duty to be the contract in writing by which the title to the allotment is constituted and duty has to be paid on that form as if it was a contract made in writing.

The contention urged on behalf of Sri Raj Sachdeva in the present case is that in his case the entire transaction consisted of only one contract and that was oral. That was the contract by which he agreed as proprietor of the private firm Messrs Globe Travels to transfer his concern with all its assets and liabilities to the company and the company in return agreed to pay him Rs.27,000 cash and to allot 720 fully paid up shares to him. That according to the learned counsel was not a contract by which either party was making any transfer in present. It was only an agreement to transfer in future. Subsequently in pursuance of it Sri Raj Sachdeva transferred to the company the assets and liabilities of his firm by delivery. As no immovable property was involved the transfer could be made by delivery alone without any contract oral or written. The company had also in pursuance of the same agreement allotted 720 fully paid up shares to Sri Raj Sachdeva without there being any oral or written contract for that purpose. He has urged that the only contract entered into between the parties being an agreement to transfer the particulars filed in the prescribed form were of that contract. Had that contract been in writing it would have been stamped only as an agreement. The form of particulars filed could not, therefore, be required to be stamped in any other manner.

The logical consequences which appear to follow from the stand taken by the learned counsel may raise some difficulties, for instance. (1) as section 104 (1) (b) of the Companies Act contemplates that title of the allottee

to the allotment of share can be constituted only by a contract whether oral or in writing no title to such allotment may have accrued to Sri Raj Sachdeva on account of the absence of a contract. Admittedly the earlier agreement which was arrived at did not pass such a title.

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(3) The assets of the firm may include goodwill, benefits to contract or actionable claims. It is seriously questionable if the company can claim title to them on the basis of delivery without any contract in writing.

(4) The particulars which had to be filed under section 104 of the Companies Act are the particulars of the contract constituting title to the allotment of shares and on the consideration of that contract. If no such particulars were filed on the pretext that no such contract was made and only the particulars of the earlier contract of sale were filed it may be possible to say that the requirements of the section had not been complied with at all and that every officer of the company was on that account liable to be prosecuted for the omission.

We are, however, not concerned in this case with any of these consequences. The only thing which we have to determine is whether the form of particulars actually filed by the company is sufficiently stamped. It is not necessary therefore to consider what stamp would have been payable on the form which ought to have been filed but was not actually filed. As has been pointed out by my Lord the Chief Justice in the referring order there is no suggestion that any contract other than a contract for sale was entered into between the parties. Nor is there any material before us on the basis of which it can be held that any other contract of sale was in fact entered into. The contract which was admittedly made was

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only an agreement to transfer in future and was chargeable with duty under Art. 5(c) of Schedule I-B to the Stamp Act and must be held to have been properly stamped. I, therefore, agree that the reference should be answered as proposed by my Lord the Chief Justice.

*By the Court*—We hold that the particulars filed by the company under section 104(2) of the Indian Companies Act, 1913 were duly stamped and answer the reference accordingly.

*Reference answered.*

### (FULL BENCH) CIVIL MISCELLANEOUS

*Before the Honourable O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Srivastava.*

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March, 17.

ADARSH BHANDAR, ALIGARH (APPLICANT)

v.

THE SALES TAX OFFICER, ALIGARH  
(OPPOSITE-PARTY)

**Uttar Pradesh Sales Tax (Validation) Act, 1958, s. 4—Invalid**  
*High Court not bound to review its previous order—Constitution of India, Art. 226.*

Section 4 of the Uttar Pradesh Sales Tax (Validation) Act, 1958 is, in its application to the High Court in exercise of its jurisdiction under Art. 226 of the Constitution, invalid and the High Court cannot be compelled to reopen its previous proceeding under Art. 226 and hold that an assessment previously held to be invalid to have been validly and lawfully done.

Civil Misc. Review Application No. 240 of 1958, in Civil Misc. Writ No. 3086 of 1956 decided on 9th May, 1957.

The facts appear in the judgment.

*Behariji Das and R. K. Das*, for the applicant.

*Standing Counsel*, for the opposite-party.



The judgment of the Court was delivered by—

MOOTHAM, C.J.:—This is an application made under section 4 of the U. P. Sales Tax (Validation) Act, 1958, (U. P. Act No. XV of 1958) for the review of an order of this Court, dated the 5th May, 1957. The respondents contend that section 4 is *ultra vires* of the State Legislature and that the application is accordingly not maintainable.

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The relevant facts are these. On the 31st March, 1956, the Governor of Uttar Pradesh in purported exercise of his powers under section 3A of the U. P. Sales Tax Act, 1948, issued a notification no. ST-905/X. By this notification the Governor was pleased to declare, *inter alia*, that the turnover in respect of certain specified classes of goods imported from outside Uttar Pradesh would, with effect from the 1st April, 1956, be taxed at the rate of one anna per rupee. The classes of goods subject to sales tax at this rate included vegetable ghee, cloth and sugar. The respondent firm carried on business in Aligarh, and on the 14th September, 1956, it was provisionally assessed to sales tax amounting to Rs.75,000 on an estimated turnover of Rs.12,00,000 on the ghee, cloth and sugar imported by it from outside Uttar Pradesh at the rate of one anna per rupee. A demand notice in respect of this amount dated the 15th September, 1956, was thereafter served on the firm.

The respondent firm thereupon filed a petition in this Court under Art. 226 of the Constitution in which it challenged the validity of the assessment order and subsequent notice of demand. That petition was allowed by this Court by its order dated the 5th May, 1957, *Messrs Adarsh Bhandar v. The Sales Tax Officer, Aligarh* (1) and a writ in the nature of *certiorari* was directed to issue quashing the assessment order dated the 14th September and the demand notice dated the

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15th September, 1956. As a consequence of this order the State Legislature enacted the U. P. Sales Tax (Validation) Act; 1958, which came into force on the 6th May, 1958, Sections 3 and 4 of that Act are material and they read as follows:

"3. *Validation of certain notifications and action taken in pursuance thereof*—(1) Notwithstanding any judgment, decree or order of any court, the notifications specified in Part A, Part B and Part C of the Schedule shall be deemed to have been issued in exercise of the powers conferred respectively by section 3, section 3-A and section 4 of the U. P. Sales Tax Act, 1948, as if the said sections were in force on the date on which the notifications were issued in the form in which they were in force immediately before the commencement of this Act and all the said notifications shall be valid and shall be deemed always to have been valid and shall continue in force until amended, varied or rescinded by any notification issued under any of the said sections.

(2) Anything done or any action taken (including any order made, proceeding taken direction issued, jurisdiction exercised, assessment made or tax levied or collected) purporting to have been done or taken in pursuance of any of the notifications specified in the Schedule shall be deemed to be, and to have been, validly and lawfully done or taken.

4. *Review of proceedings in certain cases.*—Where before the commencement of this Act, any court or authority has, in any proceeding, set aside or modified any assessment, levy or collection of any tax merely on the ground that the assessing authority had no jurisdiction to assess, levy or collect any tax in pursuance of any notification speci-

fied in the Schedule, any party to the proceeding or the Commissioner of Sales Tax may, within ninety days, from the date of the commencement of this Act, make an application to such court or authority for a review of the proceeding and thereupon, such court or authority shall review the proceeding and may make such order varying or revising the order previously made, as may be necessary, to give effect to the provisions of this Act."

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Thereafter follows a Schedule, Part B of which specified notification no. ST. 905/X, dated the 31st March, 1956. The validity of section 3 of the Act has been challenged in other proceedings which are now pending; and in the circumstances the argument before us has proceeded, and the present order is made, on the assumption that section 3 is valid. The respondent firm challenges the validity of section 4 on the ground that by it the State Legislature has sought to impose a fetter on this Court on the exercise of its jurisdiction under Art. 226 of the Constitution and that is beyond its powers.

There are two features of section 4 which require notice. First, by using the word "shall" the section compels the Court or authority concerned, including the High Court, to reopen the proceedings. Secondly, after the proceedings have been reopened the section makes it obligatory on the Court or authority to reverse its earlier decision and to pass an order giving effect to the provisions of the validating Act. The Court or authority has to hold the assessment to have been validly and lawfully done [section 3(2)]. It has no alternative.

The section is addressed to all courts and authorities which have in any proceeding set aside or modified any assessment, levy or collection of tax on the ground

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specified in the section. As the order sought to be reviewed in the present case was passed in the exercise of the writ jurisdiction of this Court we confine our consideration to the question whether the State Legislature was competent to legislate in this manner in respect of matters covered by Article 226 of the Constitution.

The Legislature derives its power to legislate from Article 245 of the Constitution and that Article specifically makes the power subject to the provisions of the Constitution which include Article 226. Learned counsel for the State therefore concedes that it is not open to the legislature to enact any law which either directly or indirectly affects the powers conferred by Article 226 of the Constitution on the High Court. As section 4 of the Validation Act leaves no discretion with the High Court in the matter of agreeing or refusing to review its previous order and, after a review is granted, makes it obligatory on the High Court to pass a particular order, it is obvious that it seriously affects those powers. In enacting this provision the legislature, in our opinion, clearly exceeded its authority and contravened Article 245 of the Constitution.

The learned counsel for the State, however, urged that even under Article 226 the Court was bound to follow the law and the law which it had to follow was the law laid down by the legislature. Within the range of its competency therefore the legislature could lay down any law which it considered proper and the High Court could not refuse to enforce it. What section 4 enacted could, he contended, be considered to relate either to sales tax or to the power of review—a matter of procedure to be followed by Courts. The former is covered by Item No. 54 of List II of the Schedule VII of the Constitution and the latter by Item No. 13 of List III.

There can be no doubt that sales tax and matters incidental to it are subjects on which the State Legislature can legislate, but in so legislating it cannot override or contravene the other provisions of the Constitution. While legislating on the subject of sales tax therefore it cannot be open to the State Legislature to pass a law on the subject of Sales Tax affecting in any way the powers of the High Court under Article 226.

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The power of the High Court to review an order passed by it under Article 226 of the Constitution is either included in the power conferred by the article itself or can be exercised under the Code of Civil Procedure in case the proceeding is treated as a civil proceeding. In the former case the provisions of section 4 by taking away the discretion to refuse to review if the High Court is of the opinion that review should not be granted and by requiring the High Court to pass a particular order and no other indirectly curtails the power conferred by the Constitution and the State Legislature had no authority to do so. In the latter case the provisions of compulsory review on a ground not mentioned in section 104 or Order XLVII, rule 1 of the Civil Procedure Code comes into conflict with those provisions of law enacted by the Centre and must on that account be held to be void in view of Article 254 of the Constitution.

From whatever angle the matter is looked at therefore we are of opinion that section 4 of the U. P. Sales Tax (Validation) Act, 1958, is, in its application to the High Court in exercise of its jurisdiction under Article 226 of the Constitution, invalid. That being the only provision under which the present application for review has been filed the application cannot succeed. It is accordingly dismissed with costs which we assess at Rs.200.

*Application dismissed.*

**(FULL BENCH) CIVIL REFERENCE**

*Before the Honourable O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Srivastava.*

MOHAMMAD MUSTAFA ALI KHAN, RAJA  
(APPLICANT)

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*v.*

RANI RAJ RAJESHWARI DEVI (OPPOSITE-PARTY)

**Indian Stamp Act, 1899, s. 61—Reference—Document—Promissory note or bond.**

The question arose whether a document which ran as follows was a promissory note or a bond:

"On demand I promise to pay at Gonda to the Court of Wards, Utraula, Bilaspur State, district Gonda, the sum of Rs.1,50,000 with interest at 3 per cent per annum for value, received by me on 5th July, 1951".

*Held*, (DAYAL, J. contra) that the document was a bond and not a promissory note and was chargeable with a duty of Rs.1,406-4 as the duty stood on the date of execution.

Case-law discussed.

Civil Reference No. 68 of 1956 under section 61 of the Indian Stamp Act.

The facts appear in the judgment.

*N. D. Pant* (Junior Standing Counsel), for the opposite-party.

MOOTHAM, C. J.:—This is a reference made to this Court under section 61 of the Indian Stamp Act by the Chief Inspector of Stamps.

The question is whether a certain promissory note is chargeable to stamp duty as a bond. The promissory note reads thus:

"On demand I promise to pay at Gonda to the Court of Wards, Utraula, Bilaspur Estate, district Gonda, the sum of Rs.1,50,000 with interest at 3

per cent per annum for value received by me on 5th July, 1951."

This document, which was duly stamped as a promissory note, was signed by the executant and bears the signatures of two witnesses.

A bond is defined in section 2(5) of the Stamp Act as including "any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another". The promissory note the subject of this reference is attested by a witness and, not being expressed to be payable to order or bearer, *prima facie* comes within the ambit of this definition. Explanation (1) to section 13 of the Negotiable Instruments Act, a section which defines a "negotiable instrument", provides however that a promissory note which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable is payable to order and the question is whether the effect of this explanation is to exclude the promissory note from being a bond as defined in the Stamp Act. It will, in my opinion, only have that effect if it can be said that the promissory note has become an instrument "payable to order"; and I do not think it has.

The stamp duty on any instrument is to be determined with reference to the terms of the instrument. In *Gatty v. Fry* (1) the question was whether a post-dated cheque payable to bearer and stamped as a bill of exchange payable on demand was admissible in evidence after the date of the cheque. CLEASBY, B., delivering the judgment of the Court said:

"The question therefore, is whether, if upon the face of the instrument the stamp is sufficient as was the case here, since the cheque, at the time of the trial, was payable on demand, it cannot be used

(1) L.R. 2 Exch. 265.

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in evidence, because, in fact, when it was given, being post-dated, it was not then payable. We think this case is concluded by authority, and that in considering whether the stamp is sufficient we must look at the instrument itself alone. The authorities are *Williams v. Jarrett* (1) *Whistler v. Forster* (2), *Austin v. Bunyard* (3).

What the Act requires is that a particular instrument which means the paper with certain things written upon it, shall have a particular stamp applicable to that instrument, not to that instrument coupled with other circumstances."

*Gatty v. Fry* (4) was approved by the Court of Appeal in *Royal Bank of Scotland v. Tottenham* (5), and the law so laid down has been consistently followed in India: see *Ramen Chetty v. Mahomed Ghouse* (6), *Sakharam Shankar v. Ramchandra Babu Mohire* (7). *The Financial Commissioner, Burma v. C.R.M.M.L.A. Chettiar Firm* (8).

The instrument before us is one which by its terms is not payable to order. Explanation (1) of section 13 (1) of the Negotiable Instruments Act was introduced into the Act, by the Negotiable Instruments (Amendment) Act, 1919, and its effect was to bring within the class of "negotiable instruments" certain promissory notes not payable to order which previously were not negotiable. The fact that a promissory note which is not expressed to be payable to order is now (provided it does not contain words prohibiting transfer or indicating an intention that it will not be transferable) a negotiable instrument does not, in my opinion, make it an instrument payable to order within the meaning of the Indian Stamp Act. This is a view which has been taken by

(1) 5 B & Ad. 32.

(3) 6 B. & S. 687.

(5) I.R. [1899] 2 Q.B. 715.

(7) (1903) I.L.R. 27 Bom. 279.

(2) 14 C.B. (N.S.) 248.

(4) [L. B.] 2 Exch. 265.

(6) (1889) I.L.R. 16 Cal. 432.

(8) (1935) I.L.R. 13 Rang. 613.



the Calcutta High Court in *Khetra Mohan Saha v. Jamini Kanta Dewan* (1), a decision which has been followed by the Madras High Court in *Veerappudayan v. Oganthappudayan* (2) and by the Nagpur High Court in *Dasrath Tukaram Teli v. Kashiram Raoji Patil* (3). With great respect I am of the opinion that the view taken in those cases is correct and I would accordingly answer the question referred to this Court by holding that the document is chargeable as a bond with a duty of Rs.1,406-4.

DAYAL, J.:—This is a reference under section 61 of the Stamp Act. The following document was executed by Rani Raj Rajeshwari Devi on 8th November, 1951:

"On demand I promise to pay at Gonda to the Court of Wards Utraula, Bilaspur Estate, district Gonda, the sum of Rs.1,50,000 (Rupees one lakh and fifty thousand) with interest at 3 per cent per annum for value received by me on 5th July, 1951."

The point for decision is whether this document is a bond under section 2(5) (b) of the Stamp Act chargeable with a duty of Rs.1,406-4 under Article 15 of the U. P. Stamp (Amendment) Act of 1948.

It is not disputed that the document in suit comes within the definition of pronote as defined in section 4 of the Negotiable Instruments Act and, therefore, it comes within the definition of promissory note in clause (22) of section 2 of the Stamp Act.

In view of clause (5) of section 2 of the Stamp Act a bond includes:

"any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another."

The document in suit is attested by witnesses and does not state expressly that it is payable to order or

(1) A.I.R. 1927 Cal. 472.

(2) A.I.R. 1929 Mad. 599.

(3) A.I.R. 1937 Nag. 61.

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bearer. It is, therefore, contended on behalf of the Chief Inspector of Stamps acting as Collector that the document is a 'Bond'. I do not agree with this contention in view of the provisions of section 13 of the Negotiable Instruments Act.

The relevant provisions of section 13 of the Negotiable Instruments Act are:

"(1) A 'negotiable instrument' means a promissory note, bill of exchange or cheque payable either to order or to bearer.

*Explanation I.*—A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

(2). . . . ."

In view of the Explanation I to section 13 of the Negotiable Instruments Act the document in suit is payable to order and is consequently a negotiable instrument. The terms of this document make it in law an instrument payable to order. They do not make it "not payable to order" and therefore do not make it a "Bond".

It is however argued that unless the document itself states expressly that it is payable to order it will, for the purposes of stamp duty, be considered to be "not payable to order."

Clause (5) of section 2 of the Stamp Act does not state that the fact of the non-payability of the instrument to order be expressed in the instrument itself. If this clause had required the document itself to express that it would be payable to order in order that it be not considered a Bond, this definition of the Bond would require the insertion of an expression expressed to be between the words 'not' and 'payable'. There

seems to me no justification for considering these words to exist in the definition of the word 'Bond'. According to clause (7) of this section cheque means a bill of exchange drawn on a specified banker and not expressed to be payable otherwise on demand. It is to be noticed that the expression 'expressed to be' exists between the words 'not' and 'payable.' These words, as already noticed, do not appear in the relevant definition of the Bond.

Clause (21) of this section defines power-of-attorney to include any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it. I do not expect the document itself to mention that it is not chargeable with a fee under the law relating to court-fees for the time being in force. Whether the document is so chargeable or not would depend on the provisions of the Court Fees Act and the terms of the document under consideration.

In support of the contention reliance is placed on the cases of *Khetra Mohan Saha v. Jamini Kanta Dewan* (1) *Rozario v. Hariballabh* (2), *Dashrath Tukaram v. Kashi-ram Raoji* (3) and *Veerappudayan v. Oganthappudayan* (4). The later cases have just followed the earliest Calcutta case. The only reason in that case for holding that the document should on its face indicate that it was not payable to order or bearer is stated to be "that for the purposes of the Stamp Act the documents as they appear on the face of them have to be considered".

In support of this proposition, reliance is placed on the observations in *Gatty v. Fry* (5) which have been followed in other cases. I do not draw such a conclusion from those cases.

(1) A.I.R. 1927 Cal. 472.

(2) A.I.R. 1927 Nag. 109.

(3) A.I.R. 1937 Nag. 61.

(4) A.I.R. 1929 Mad. 599.

(5) L.R. 2 Exch. 265.

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The question in *Gatty v. Fry* (1) was whether a post-dated cheque payable to bearer can be used in evidence after the date of the cheque. The answer was:

"We think this case is concluded by authority, and that in considering whether the stamp is sufficient we must look at the instrument itself alone. The authorities are, *Williams v. Jarrett* (2) *Whistler v. Forster* (3) *Austin v. Bunyard* (4).

"Any other conclusion would have introduced the greatest difficulty in the administration of justice, and before a judge could determine whether the stamp was sufficient, the trial would be interrupted by collateral inquiries as to facts accompanying the giving of the instrument. What the Act requires is that a particular instrument, which means the paper with certain things written upon it, shall have a particular stamp applicable to that instrument and not to that instrument coupled with other circumstances."

The observations, to my mind, simply mean that the Court is not to make collateral inquiries with respect to facts accompanying the giving of the instrument and not that the Court is to determine the nature of the document on the express language of the instrument alone without taking into consideration under which category the document comes on account of its terms and their effect according to law. To consider the combined effect of the terms of the document in conjunction with the legal provisions can create no practical difficulties in the administration of justice; rather it would help it.

In *Williams v. Jarrett* (2) the question for decision was whether a document not properly stamped when executed but properly stamped according to the date

(1) L.R. 2 Exch. 265.

(3) 14 C.B. (N.S.) 248.

(2) 5 B. &amp; Ad. 32.

(4) 6 B. &amp; S. 2687.

it bore was admissible in evidence. The answer was in the affirmative. DENMAN, C. J. said:

"If a bill bears no date, we must ascertain, by evidence, the day when it issued; but where there is a date, that must be considered as the time to which the schedule refers."

This case therefore contemplates even the taking of evidence about fact in determining the admissibility of a document on the ground of its being properly stamped.

In *Whistler v. Forster* (1) reference was made to *Williams v. Jarrett* (2) in connection with the view that the instrument is to be taken to have been drawn according to the date appearing upon the face of it.

In *Austin v. Bunyard* (3) the cases of *Williams v. Jarrett* (2) and *Whistler v. Forster* (1) were relied upon for the principle "that in construing the early statutes on stamps we are to look to the date on the face of the instrument".

In *Royal Bank of Scotland v. Tottanham* (4) the question arose again with reference to a post-dated cheque and it was held that a post-dated cheque stamped as a cheque, was admissible in evidence in an action brought after the date of the cheque, by the holder, since, under the Stamp Act, 1891, the test of admissibility was whether the instrument appeared, when tendered in evidence to be sufficiently stamped, Lord ESHER, M. R. said at page 718:

"The only other defence raises the question whether the cheque was payable on demand. It is dated August 10, and there is nothing on the face of it to shew it is not payable on demand . . . Questions under the Stamp Act must be determined by the conditions existing when the

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(1) 14 C.B. (N.S.) 248.

(3) 6 B. &amp; S. 687.

(2) 5 B. &amp; Ad. 32.

(4) L.R. [1894] 2 Q.B. 715.

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question is raised. An objection to a stamp has to be determined by the judge at the trial, and a stamp objection to a cheque, which is otherwise in order, that it was post-dated, could only be taken if the action comes on before the date on the cheque."

It appears that the contents of the cheque did not have the expression 'payable on demand' and that therefore it was considered payable on demand from the nature of its contents and the law applicable to it, and it is in such contest that it was observed: "There is nothing on the face of it to shew it is not payable on demand." It can be said in the present case that there is nothing on the face of the document in suit to show it was not payable to order. Its payability to order is a result of the provisions of section 13 of the Negotiable Instruments Act.

In *Ramen Chetty v. Mahomed Ghose* (1) question for consideration was about the admissibility of a post-dated cheque. WILSON, J. said at page 435:

"The cases of *Bull v. O'Sullivan* (2) and *Gatty v. Fry* (3), which cases are entirely in accordance with the earlier authorities are clear to show that in determining whether a document is sufficiently stamped "for the purpose of deciding upon its admissibility in evidence, you must look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence; . . . . ."

The case is therefore limited to the question of admissibility and excludes the consideration of collateral circumstances to be proved by evidence but does not exclude a determination of the nature of the document on legal considerations.

(1) (1889) I.L.R. 16 Cal. 432.

(2) (1870-71) L.R. 6 Q. B. 209.

(3) [1876-77] L.R. 2 Exch. 265.

The case of *Sakharam Shankar v. Ramchandra Babu Mohira* (1) again excludes from consideration all such facts which would be matter of evidence.

In *The Financial Commissioner, Burma, v. C. R. M. M. L. A. Chettiar Firm* (2) PAGE, C. J. observed at page 616:

"It is well settled that the stamp duty payable upon an instrument must be determined by referring to the terms of the document, and that the Court is not entitled to take into consideration evidence *de hore* the instrument itself."

This case gives effect to the view that facts dependent upon evidence have no bearing on the determination of the nature of a document for the purpose of stamp duty. The stamp duty is to be determined by reference to the terms of the document. It is on account of the terms of the document in suit that it should be considered to be a promissory note and not a Bond because the terms of the document would make it payable to order in view of section 13 of the Negotiable Instruments Act.

In *U. K. Janardhano Rao v. Secretary of State for India* (3) RANKIN, C. J. said at page 34:

"Now, an instrument must be stamped according to its legal effect and intention."

and again at page 36:

"The instrument has to be stamped according to the true intent and meaning of the bargain which it represents."

It would follow from these observations that in considering the proper stamp duty on a particular instrument the terms of the instrument and their legal effect should be taken into consideration for the purposes of the Stamp Act.

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(1) (1903) I.L.R. 27 Bom. 279. (2) (1935) I.L.R. 13 Rang. 613.  
(3) (1931) I.L.R. 58 Cal. 33.

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I would therefore hold that the document in suit is not a Bond under section 2(5) (b) of the Stamp Act.

SRIVASTAVA, J.:—I have had the privilege of reading the judgments prepared by my Lord the Chief Justice and by my brother DAYAL, J. I have no hesitation in preferring the view of the former. What appears to have weighed greatly with brother Dayal is that the definition of the term 'Bond' does not require that the non-payability of the instrument to order or bearer should be expressed in the instrument itself. He concludes from this that if the instrument is to be considered payable to order by virtue of the First Explanation of section 13 of the Negotiable Instruments Act it gets excluded from the ambit of the definition. Keeping in mind the purpose for which the explanation was added in 1919, however, it appears to me that the Explanation makes the instrument payable to order only for the limited purpose of negotiability and not for all purposes. An instrument may be payable to order for the purpose of Negotiable Instruments Act but that does not necessarily make it so payable for the purposes of the Stamp Act. It is not without significance that no Explanation similar to Explanation I of section 13 of the Negotiable Instruments Act was added to the definition of the term 'Bond' in the Stamp Act. For the purpose of judging the stamp duty payable under the Stamp Act we have to confine ourselves to the provisions of that Act and the terms of the instrument in question. As contemplated by section 27 of the Stamp Act, all facts and circumstances affecting the chargeability of the instrument with duty or the amount of duty with which it is chargeable are to be fully and truly set forth in the instrument itself and it is on their basis that the duty has to be assessed.

In respectful agreement with my Lord the Chief Justice therefore I also answer the question referred to



us in the affirmative and hold that the document before us is chargeable to duty as a bond.

*By the Court*—We are of opinion that the document is chargeable as a bond with a duty of Rs.1,406-4, and we answer the question referred to us accordingly.

*Question answered.*

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### (FULL BENCH) CIVIL REFERENCE

*Before the Hon'ble O. H. Mootham, Chief Justice,  
Mr. Justice Dayal and Mr. Justice Srivastava.*

MUNICIPAL BOARD, BAREILLY (APPLICANT)

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KUNDAN LAL (OPPOSITE-PARTY)

**United Provinces Municipalities Act, 1916, s. 128—Imposition of tax—Not void—Question of particular house tax—Question of evidence.**

[*Per* MOOTHAM, C. J. and SRIVASTAVA, J., DAYAL, J. dissenting.]

Section 128 of the United Provinces Municipalities Act, 1916 is not void in so far as it authorizes a Municipal Board to impose certain taxes mentioned in it on any part of the Municipality.

The question, if the imposition by the Municipal Boards of a particular house tax in respect of a building, is justified or not is to be decided on evidence and in accordance with the provisions of the Act.

Case-law discussed.

Civil Reference No. 67 of 1954 under section 113 of the Civil Procedure Code.

The facts appear in the judgment.

*J. Swarup* and *H. P. Gupta*, for the applicant.

*S. N. Misra*, *B. L. Gupta*, and *D. D. Seth*, for the opposite-party.

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MOOTHAM, C.J.:—This is a reference under section 113 of the Code of Civil Procedure made by the Judge of the Court of Small Causes, Bareilly.

Sri Kundan Lal, who resides in the Civil Lines, Bareilly, was assessed to tax in the sum of Rs.300 by the Municipal Board of Bareilly on two houses owned by him and situated in Ward No. 2, Bareilly. Demand was made for payment of this amount but Sri Kundan Lal refused to pay and a suit was filed against him in the court of the Judge of Small Causes by the Municipal Board for the recovery of the tax.

The tax had been imposed a number of years earlier by the Municipal Board in exercise of its powers under section 128(1) of the U. P. Municipalities Act, 1916, which provides that—

“128(1) Subject to any general rules or special orders of the State Government in this behalf, the taxes which a board may impose in the whole or any part of a municipality are—

(i) a tax on the annual value of buildings or lands or of both;

(ii) a tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services;

(iii) a tax on trades, callings and vocations including all employments remunerated by salary or fees;

(iv) a tax on vehicles and other conveyances plying for hire or kept within the municipality or on boats moored therein;

(v) a tax on dogs kept within the municipality;

(vi) a tax on animals used for riding, driving draught or burden, when kept within the municipality;

(vii) a toll on vehicles and other conveyances, animals and laden coolies entering the municipality;

(viii) an octroi on goods or animal brought within the municipality for consumption or use therein;

(ix) a tax on inhabitants assessed according to their circumstances and property;

(x) a water tax on the annual value of buildings or lands or of both;

(xi) a scavenging tax;

(xii) a tax for the cleansing of latrines and privies;

(xiii) a tax on goods imported into, or exported from, any municipality in which an octroi was in force on the sixth of July 1917 or with the previous sanction of the Central Government any other Municipality;

(xiv) any other tax which the State Legislature has power to impose in the State, under the Constitution."

It is not in dispute that the tax in question is imposed only on buildings or lands in Ward No. 2 of the Bareilly Municipality, and it was Sri Kundan Lal's contention that upon the coming into force of the Constitution the tax had become illegal. In the written statement which he filed in the suit he contended that it was no longer legal for the Municipal Board to recover tax on the annual value of buildings and lands (commonly called 'house tax') from the owners of houses in one Ward alone without providing for special amenities to the residents of that Ward, but at the hearing before the learned

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judge Sri Kundan Lal was allowed to raise the wider question whether the power conferred upon a municipal board by section 128(1) of the Act to impose taxes "in . . . any part of a municipality" was valid, the contention being that this provision conferred upon the board a wholly unfettered and arbitrary right to impose a tax on any group of residents within municipal limits that it might choose. The learned judge was of opinion that for the purposes of the suit it was necessary for him to decide the question of the validity of section 128(1) of the Act, and in his opinion that sub-section, to the extent that it enabled the municipal board to impose a tax in a part of a municipality, was invalid as contravening Art. 14 of the Constitution. He was further of opinion that no house-tax could accordingly be recovered from Sri Kundan Lal. It is in these circumstances that the learned judge has referred to this Court the following question :

"Whether section 128 of the Municipalities Act is void in so far as it authorises a Municipal Board to impose certain taxes mentioned in it on any part of the municipality and whether the house-tax imposed on the plaintiff, who is resident in the Civil station, Bareilly, in pursuance of the power given by section 128 of the Municipalities Act is invalid and *ultra vires* of the Municipal Board, Bareilly, due to Article 14 of the Constitution of India?"

The submissions of the parties can be shortly stated.

For Sri Kundan Lal it is contended that the impugned section leaves it entirely to the discretion of the Municipal Board to determine upon whom it will impose a tax or taxes and that as the Act lays down no principle or policy for the guidance of the Municipal Board in the exercise of that discretion Art. 14 is infringed. For the Municipal Board it is argued, first, that no question of any contravention of Art. 14 of the

Constitution arises; secondly, that the discretion vested in the Board is not unfettered but is controlled by the policy underlying the Act.

The scope of Art. 14 has been considered on a number of occasions by the Supreme Court. In the recent case of *Ram Krishna Dalmia v. Justice Tendolkar* (1) the Court cited with approval a passage from *Budhan Choudhry v. The State of Bihar* (2) in which the Court had said—

“It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.”

The learned Chief Justice who delivered the judgment in *Ram Krishna Dalmia's* case then summarized the decisions of the Court in which Art. 14 had been considered. He pointed out that they fall into five classes. Learned counsel for Sri Kundal Lal submits that the present case falls within the third of these classes with regard to which the learned Chief Justice said:

“A statute may not make any classification of the persons or things for the purpose of applying its

(1) A.I.R. 1958 S.C. 538.

(2) (1955) 1 S.C.R. 1045.

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provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on the face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law....."

The contention in the present case is that there is not to be found in section 128 or elsewhere in any Act any statement of policy or principle which would serve as a guide to the Board in selecting the part of the municipality in which it will impose one or more of the taxes referred to in section 128(1). It is clear that section 128 does not itself provide any guide, but that however does not conclude the matter. It is necessary to examine the Act as a whole to ascertain, if possible, the policy underlying it, for that policy may itself suffice to provide a guide for the exercise of discretionary powers which the Act confers. This is now, I think, well settled : see for

example *Hari Shanker Bagla v. The State of Madhya Pradesh* (1), *A. T. K. Musaliar v. M. Venkatachalam Potti* (2). The U. P. Municipalities Act, 1916 is a consolidating Act and replaces the North-Western Province and Oudh Municipalities Act, 1900 the purpose of which was to make better provision for the organization and administration of municipalities, obviously for the benefit of the residents within municipal areas. The Act imposes on a municipal board the duty to make provision for numerous matters of general public interest (sec. 7) and also confers upon it wide discretionary powers, including, *inter alia*, the laying out of new public streets and acquiring land for that purpose, the construction, establishment and maintenance of public parks, libraries, orphanages and other works of public utility and the reclaiming of unhealthy localities (section 8). The provisions of the Act with regard to taxation were in my opinion designed to enable a municipal board to achieve the purpose for which it was created ; and it is therefore in my judgment legitimate to conclude that the power vested in the Board to select part of the municipality within which to levy a tax is not an arbitrary power but one which is to be controlled by the purpose which is intended to be achieved by the Act itself. In *Pannalal Binjrai v. Union of India* (3) the validity of section 5 (7A) of the Indian Income Tax Act, which empowered the Commissioner of Income Tax and the Central Board of Revenue to transfer a case from one Income-tax Officer to another, was challenged on the ground that the power of transfer vested in these authorities was a naked and arbitrary power unguided and uncontrolled by any rules. That contention was rejected by BHAGWATI, J., who, speaking on behalf of the Court, said at page 407 :

"It has to be remembered that the purpose of the Act is to levy income-tax, assess and collect the

(1) A.I.R. 1954 9 C. 465.

(2) A.I.R. 1956 S.C. 246.

(3) 1957 S.C.R. 233.

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same . . . . . It follows, therefore, that all the provisions contained in the Act have been designed with the object of achieving that purpose. . . .” and at page 410:

“It is, therefore, clear that the power which is vested in the Commissioner of Income Tax or the Central Board of Revenue, as the case may be, under section 5(7-A) of the Act is not a naked and arbitrary power, unfettered, unguided or uncontrolled so as to enable the authority to pick and choose one assessee out of those similarly circumstanced thus subjecting him to discriminatory treatment as compared with others who fall within the same category. The power is guided and controlled by the purpose which is to be achieved by the Act itself, viz., the charge of income-tax, the assessment and collection thereof, and is to be exercised for the more convenient and efficient collection of the tax.”

The exercise by the Board of the powers vested in it under sections 7 and 8 of the Act will not necessarily benefit the residents in different parts of the municipality to the same extent; the reclamation of an unhealthy locality, the construction of a sewage system, the laying out of new streets or the construction of a public park, for example, may directly benefit only those residents living in a particular locality, and *prima facie* it appears unfair that the cost involved in these undertakings should necessarily be borne by all the residents of the municipality. That would be the consequence if the law prohibits a municipal board from imposing a tax in a part only of the municipality. As pointed out in *Hagar v. Reclamation District No. 108*(1).

“There would often be manifest injustice in subjecting the whole property of the city . . . . . to taxation for an improvement of a local character”.

(1) 111 U.S. 701; 28 Law. Ed. 569.



I am of opinion that if a municipal board decides to impose a tax on the annual value of buildings it is not under an obligation to impose that tax on every building within municipal limits or at the same rate on all the buildings, but every differentiation to be valid must be founded on a classification which passes the two tests laid down in *Budhan Choudhry's* case.

Learned counsel for the Board has however contended that the Board has a right to select a taxing area within municipal limits and that provided the tax is imposed equally on all persons resident in that area no question of discrimination would arise which would attract the provisions of Art. 14. He has cited no Indian authority in support of this proposition but has relied on passages to be found in writers on American constitutional law, and in particular on two passages in Willis on Constitutional Law to be found at pages 587 and 589. In the former of these passages the learned author says:

"The Supreme Court permits a wider discretion in classification under the power of taxation, if possible, that it does under the police power. One reason for this undoubtedly is the urgent need for revenue by the various governmental agencies. A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably."

and at page 589 the author says:

"The equality clause does not forbid geographical classification. A State, if it desires, may levy taxes over the entire State and thus make the State the unit; but if the State desires, it may establish taxing districts or other sub-divisions, like a city or territory within a city. In such cases all that is required is the same basis of classification within the district

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or sub-division. Inequality of apportionment between the State as a whole and such district or sub-division will not invalidate the tax."

The principal authorities cited by the learned author in support of these statements are *Forsyth v. Hammond* (1), *Fallbrook Irrigation District v. Bracleu* (2), *Myles Salt Co. Ltd. v. Board of Commissioners* (3), *Kelly v. Pitsburg* (4). I do not think that the passages cited by learned counsel or the authorities referred to therein really support the proposition for which learned counsel contends. The learned author, in my opinion, says no more than that as regards matters of taxation the U. S. Supreme Court permits a very wide degree of classification, but nevertheless there must be a classification whether it be as regards districts, objects, persons, methods or the like, and that that classification must be reasonable. None of the cases goes so far as even to suggest that the authority upon whom the State has conferred the power of taxation can itself discriminate between persons subject to taxation on a geographical basis unless that basis can be justified as a reasonable classification.

I would accordingly answer the first part of the reference in the negative, and the second part by saying that the particular house-tax imposed by the Municipal Board, Bareilly, on the plaintiff in respect of his building in Ward No. 2 can be void only if it cannot be justified by the Board on the ground already stated by us. Whether it can be so justified will depend on evidence which is still to be produced in the case.

DAYAL, J.:—I have had the advantage of reading the judgment of My Lord the Chief Justice and with respect do not agree that the U. P. Municipalities Act, 1916 (hereinafter called the Act) provides the requisite guide

(1) 166 U.S. 506; 41 Law. Ed. 1095. (2) 164 U.S. 112; 41 Law. Ed. 369.  
(3) 239 U.S. 478; 60 Law. Ed. 392. (4) 104 U.S. 78; 26 Law. Ed. 658.

for the exercise of the discretionary power vested in the Municipal Board to impose any of the taxes mentioned in sub-section (1) of section 128 of the Act in any part of the municipality.

Section 128 itself does not lay down any guide. It just provides that a Board may impose in the whole or any part of the municipality the taxes mentioned therein. On what principle the Board is to select a part of the municipality for the imposition of a tax the section is silent. It is contended for the appellant that the requisite guide for such selection is to be found in the purpose of the Act, which controls the exercise of this power to impose a tax in any part of the municipality, that the purpose of taxation is to provide funds for the Municipal Board so that it be in a position to discharge its various duties mentioned in sections 7 and 8 of the Act, that the impugned tax on a portion of the municipality was imposed for this purpose, and that it would be a valid tax unless it be established by the respondent that there exists no good reason for the separate classification of his ward for the purpose of this tax. Reliance is placed on the case of *Pannalal Binjrai v. Union of India* (1) which in my opinion, is distinguishable and does not cover the present case.

In *Panna Lal Binjrai's* case, the *vires* of section 5(7-A) of the Indian Income Tax Act were questioned. This section just authorized the Commissioner of Income Tax to transfer any case from one Income Tax Officer subordinate to him to another, and authorized the Central Board of Revenue to transfer any case from one Income Tax Officer to another. Such transfers could be made at any stage. Section 64 of the Income Tax Act provided for the assessment to be made by the Income Tax Officer of the area in which the place of business was situate. These provisions had been construed to confer a right on the assessee in earlier decisions.

(1) 1957 S. C. R. 233.

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The contention for the petitioner therefore was that section 5(7-A) invested the Commissioner of Income Tax and the Central Board of Revenue with naked and arbitrary power to transfer any case from one Income Tax Officer to another without any limitation in point of time, a power which was unguided and uncontrolled and was discriminatory in its nature and that it was open to the Commissioner of Income Tax or the Central Board of Revenue to pick out the case of one assessee from those of others in a like situation and transfer the same from one State to another or from one end of India to the other without specifying any object and without giving any reason, thus subjecting the particular assessee to discriminatory treatment whereas the other assessees similarly situated with him would continue to be assessed at the places where they resided or carried on business. It was contended that the discrimination involved was substantial in character and therefore infringed the fundamental right enshrined in Art. 14 of the Constitution.

The reply for the State was (i) that the provisions contained in section 5(7-A) of the Act was a measure of administrative convenience enacted with a view to more conveniently and effectively deal with the cases of the assessee; (ii) that the assessee was not subject to any discriminatory procedure in the matter of his assessment on account of the transfer of his case from one Income Tax Officer to another; (iii) that the right, if any, conferred upon the assessee under section 64(1) and (2) of the Act was not an absolute right but was circumscribed by the exigencies of the tax collection; (iv) that the power which was thus vested was a discretionary power and it was not necessarily discriminatory in its nature and that abuse of power was not to be easily assumed where discretion was vested in such high officials of the State. Even if abuse of power sometimes occurred

the validity of the provision cannot be contested because of such apprehension.

With respect to the right of the assessee to be assessed by the Income Tax Officer of a certain place, BHAGWATI, J. observed at p. 252 :

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“This right, however, according to the authorities above referred to, is hedged in with the limitation that it has to yield to the exigencies of tax collection.

The position, therefore, is that the determination of the question whether a particular Income Tax Officer should assess the case of the assessee depends on (1) the convenience of the assessee as provided in section 64(1) and (2) of the Act, and (2) the exigencies of tax collection and it would be open to the Commissioner of Income Tax and the Central Board of Revenue who are the highest amongst the Income-tax Authorities under the Act to transfer the case of a particular assessee from the Income Tax Officer of the area within which he resides or carries on business to any other Income Tax Officer if the exigencies of tax collection warrant the same.”

He further observed “that the infringement of such a right by the order of transfer under section 5(7-A) of the Act is not a material infringement. It is only a deviation of a minor character from the general standard and does not necessarily involve a denial of equal rights for the simple reason that even after such transfer the case is dealt with under the normal procedure which is prescribed in the Act” and finally observed at p. 253 :

“There is thus no differential treatment and no scope for the argument that the particular assessee is discriminated against with reference to others similarly situated.”

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He again observed at p. 260 :

"There is no fundamental right in an assessee to be assessed in a particular area or locality. Even considered in the context of 64(1) and (2) of the Act this right which is conferred upon the assessee to be assessed in a particular area or locality is not an absolute right but is subject to the exigencies of tax collection. The difference, if any, created in the position of the assessee *qua* others who continue to be assessed by the Income Tax Officer of the area in which they reside or carry on business is not a material difference but a minor deviation from the general standard and would, therefore, not amount to the denial of equal rights."

Dealing with the contention that the power vested in the Commissioner of Income Tax and the Central Board of Revenue under section 5(7-A) was a naked and arbitrary power unguided and uncontrolled by any rules BHAGWATI, J. said at p. 255 :

"It has to be remembered that the purpose of the Act is to levy income-tax, assess and collect the same. The preamble of the Act does not say so in terms it being an Act to consolidate and amend the law relating to income-tax and super-tax but that is the purpose of the Act as disclosed in the preamble of the First Indian Income-Tax Act of 1886 (Act 11 of 1886). It follows, therefore, that all the provisions contained in the Act have been designed with the object of achieving that purpose."

It is to be noted that the purpose of the Act is not gathered from the preamble of the Indian Income Tax Act of 1922 which is "to consolidate and amend the law relating to income tax and super-tax", but from the preamble of the First Indian Income Tax Act of 1886 which is "An Act for imposing a tax on income. . . ."

The preamble of the U. P. Municipalities Act (II of 1916) is to consolidate and amend the law relating to municipalities and that of the North-Western and Oudh Municipalities Act (I of 1900) is to make better provision for the organization and administration of municipalities."

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After mentioning certain provisions of the Act he observed at p. 256:

"There is, therefore, considerable force in the contention which has been urged on behalf of the State that section 5(7-A) is a provision for administrative convenience."

This power is to be exercised in a manner which is not discriminatory. BHAGWATI, J. observed:

"No rules or directions having been laid down in regard to the exercise of that power in particular cases, the appropriate authority has to determine what are the proper cases in which such power should be exercised having regard to the object of the Act and the ends to be achieved . . . In such cases the Commissioner of Income Tax or the Central Board of Revenue, as the case may be, has to exercise its discretion with due regard to the exigencies of tax collection. Even though there may be a common attribute between the assessee whose case is thus transferred and the assessee who continue to be assessed by the Income Tax Officer of the area within which they reside or carry on business, the other attributes would not be common . . . Even if there is a possibility of discriminatory treatment of persons falling within the same group or category, such possibility cannot necessarily invalidate the piece of legislation."

It was further observed at p. 257:

"This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily

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assumed where the discretion is vested in such high officials."

Mr. Justice BHAGWATI further observed at p. 261 :

"It is, therefore, clear that the power which is vested in the Commissioner of Income Tax or the Central Board of Revenue, as the case may be, under section 5(7-A) of the Act is not a naked and arbitrary power, unfettered, unguided or uncontrolled so as to enable the authority to pick and choose one assessee out of those similarly circumstanced thus subjecting him to discriminatory treatment as compared with others who fall within the same category. The power is guided and controlled by the purpose which is to be achieved by the Act itself, viz., the charge of income-tax, the assessment and collection thereof, and is to be exercised for the more convenient and efficient collection of the tax."

Finally he observed :

"There is a broad distinction between discretion which has to be exercised with regard to a fundamental right guaranteed by the Constitution and some other right which is given by the statute. If the statute deals with a right which is not fundamental in character the statute can take it away but a fundamental right the statute cannot take away. Where, for example, a discretion is given in the matter of issuing licences for carrying on trade, profession or business or where restrictions are imposed on freedom of speech, etc., by the imposition of censorship, the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions. Discretion of that nature must be differentiated from discretion in respect of matters not involving fundamental rights such as



transfers of cases . . . In other words, the discretion vested has to be looked at from two points of view, viz., (1) does it admit of the possibility of any real and substantial discrimination, and (2) does it impugn on a fundamental right guaranteed by the Constitution? Article 14 can be invoked only when both these conditions are satisfied. Applying this test, it is clear that the discretion which is vested in the Commissioner of Income Tax or the Central Board of Revenue, as the case may be, under section 5(7A) is not at all discriminatory."

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In this case, the right conferred on the petitioner by section 64 Income Tax Act was not a fundamental right, was subject to the exigencies of tax collection and had not been materially infringed. There was no likelihood of any two cases under those Acts to be exactly similar.

It was in connection with the alleged discriminatory administrative power vested in an authority with respect to a matter affecting a right conferred upon a person under a particular statute that it was considered that the power was guided and controlled by the purpose which is to be achieved by the Act. It is not to be so when the discretion vested impugnes on a fundamental right guaranteed by the Constitution. In that case, the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions.

In the present case the power vested in the Board to impose a tax in a part of the municipality affected a fundamental right to hold and dispose of property and had to be controlled by clear provisions in the Act. Thus to impose a tax is not an administrative power and even if it be such a power it is not at par with the power to transfer a case of assessment under the Income Tax Act.

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It cannot be in every case that the validity of a provision of an Act will depend on the consideration that the provision is enacted to achieve the purpose of the Act and that the purpose of the Act is to be gathered from the provisions of the Act or its preamble. Every Act must be enacted with a definite purpose and every provision of an Act must be enacted in order to achieve that purpose. If these were the sole considerations for considering a certain provision to be valid, I hardly imagine any case in which a provision can be said to be such that the power it confers is a naked and arbitrary power unfettered by any rule of guidance for the exercise of that power. I am, therefore, of opinion that *Panna Lal Binjraj's* case is not apposite to the present case and cannot be a useful guide in determining the question before us.

Further the purpose of the Municipalities Act, as gathered from the preamble of the North-Western Provinces and Oudh Municipalities Act, 1900, is to make better provision for the organization and administration of the municipalities in the State. This purpose hardly gives any guide as to how the taxing powers are to be exercised. Sections 7 and 8 of the Municipalities Act lay down the duties and discretionary functions of the Municipal Board respectively. To discharge its functions and duties the Board must raise funds. For this purpose section 128 vests it with the taxing power. All taxes mentioned in that section except the taxes mentioned in clauses (x), (xi) and (xii) of sub-section (1) have to meet the general expenses of the Board. The taxes, that is, water tax, scavenging tax and the tax for cleansing of latrines and privies, mentioned in clauses (x), (xi) and (xii) are to be imposed solely with the object of defraying the expenses connected with water supply, with the scavenging or the cleansing of latrines and privies respectively. I do not find any guidance from the purpose and the nature of duties and functions of the Munici-

pal Board and its need to raise money in the matter of the Board's deciding as to whether one of the general taxes is to be levied in the whole of the municipality or in any part of it. It would be in the interest of raising the funds and thus consistent with the object of providing funds to the Board that the incidence of a tax be widespread and be not restricted to any particular locality.

I can imagine circumstances which may possibly justify imposing a particular tax on a particular part of the municipality. In general such circumstances would be when the tax is imposed to meet the specific costs, initial or recurring, of some work which benefits that particular portion of the municipality alone. The Legislature has to say in the Act that a tax can be imposed on a part of the municipality in such and such circumstances. This the Legislature failed to do with respect to the provision authorizing the Board to impose a tax on any part of the municipality. It is within the unfettered discretion of the municipality to impose any of the taxes mentioned in sub-section (1) of section 128 in any part of the municipality. This provision therefore comes within category (iii) of the five categories mentioned in paragraph 12 in the case of *Ram Krishna Dalmia v. Justice Tendolkar* (1) which is:

"A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for

(1) A.I.R. 1958 S. C. 538.

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the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situated and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law."

The Municipalities Act does not make any classification and leaves it to the discretion of the municipality to select any part or any portion of the municipality for the purpose of imposing any tax. No principle or policy for guiding the exercise of this discretion in the matter of selecting that portion of the municipality is laid down in the Municipalities Act. The statute itself therefore provides the delegation of arbitrary and uncontrolled power to the Board so as to enable it to discriminate between persons or things similarly situated. It follows that the discrimination is inherent in the statute itself and that therefore this provision of section 128(1) vesting the Board with power to impose any tax in any part of the municipality is to be struck down as discriminatory and violative of the fundamental right conferred by Article 14.

It is next contended for the appellant that even if the provision in section 128 of the Act empowering a Municipal Board to impose a tax on any part of the Municipality be void, the Municipality can still impose a tax on a portion of the Municipality provided it could be justified on the basis of reasonable classification in

the exercise of its power to impose the tax in the Municipality. The contention would have had force if the taxing provision had provided that the Board could impose the taxes in a Municipality. In that case there would not have been any particular restriction on the power of the Board with respect to the imposition of the tax. In the exercise of its power to impose a tax it could impose it within the entire Municipality or within a portion of it on the basis of reasonable classification. The relevant portion of sub-section (1) of section 128 of the Municipalities Act is:

“Subject to any general rules or special orders of the State Government in this behalf, the taxes which a board may impose in the whole or any part of a municipality area.”

In view of what I have said above about the power to impose a tax in any part of the Municipality to be void, the valid portion in sub-section (1) of section 128 would be “subject to any general rules or special orders of the State Government in this behalf, the taxes in the whole Municipality are”. There is thus a limitation on the power of a Board to impose a tax and the limitation is that it must be imposed within the whole Municipality. On account of the voidness of the expression “or any part of Municipality” in sub-section (1) of section 128 of the Act the word “whole” too does not deserve to be deleted or struck down. Article 13 of the Constitution provides that a law shall be void to the extent of its inconsistency with the provisions of Part III of the Constitution. The provision enacted in sub-section (1) of section 128 of the Act is therefore void to the extent that it provides for the imposition of a tax by the Board in any part of the municipality. It is not void in so far as it empowers the Board to impose a tax in the whole of a municipality. I there-

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fore hold that the Board cannot impose a tax on a portion of the municipality on the basis of reasonable classification when sub-section (1) of section 128 provides for the imposition of a tax in the whole of a municipality.

My answer to the question referred to would be that section 128 of the Municipalities Act is void in so far as it authorizes a municipal board to impose certain taxes mentioned in it on any part of the Municipality and that the house tax imposed upon the plaintiff in respect of his building in Ward No. 2 in pursuance of the power given under section 128(1) is invalid and *ultra vires* of the Municipal Board, Bareilly, due to Article 113 of the Constitution.

SRIVASTAVA, J.:—I am grateful to my Lord the Chief Justice and to my brother Dayal for their making available to me the judgments which they have prepared in this reference. I am in respectful agreement with the view taken by the former.

It is true that under section 128(1) of the U. P. Municipalities Act it has been left to the discretion of the Municipal Board to determine whether a tax is to be imposed on the whole or only a part of the area over which it has jurisdiction. But on that account alone the provision cannot be struck down as discriminatory. According to my brother Dayal, the Legislature should have itself provided in the Act "that a tax can be imposed on a part of the municipality in such and such circumstances." The circumstances in which a tax could be imposed on a part of the Municipal area only could, however, be infinite and from the very nature of things all of them could not have been anticipated. The Legislature therefore appears to have advisedly left it to individual Municipal Boards to decide over which area a tax is to be imposed. It was not neces-

sary that the principles to guide the exercise of the discretion should have been mentioned in the Act itself. Ever since the decision in the case of *Hari Shanker Bagla v. The State of Madhya Pradesh* (1), a decision which has been followed in several subsequent cases including *A. Thangal Kunju Musaliar v. M. Venkatachalam Potti* (2), *Inder Singh v. The State of Rajasthan* (3) and *Virendra v. The State of Punjab* (4) it has been taken to be settled law that the policy underlying an Act may itself provide a guide for the exercise of the discretion which the Legislature vests under the Act in a particular authority. As my Lord the Chief Justice has pointed out the policy underlying the Act, the purposed for which municipal boards have been created and the duties which they have to perform really furnish the necessary guide. The discretion given cannot therefore be said to be entirely unfettered. It may be that the decision to impose a particular tax in a particular area may be open to the objection that it is discriminatory and the classification on which it is based is not reasonable. In that case that particular decision may be liable to be challenged, but on that account section 128(1) itself cannot be held to be void.

I therefore agree that the reference should be answered in the manner proposed by my Lord the Chief Justice.

BY THE COURT—We answer the first part of the reference in the negative, and the second part by saying that the particular house tax imposed by the Municipal Board, Bareilly, on the plaintiff in respect of his building in Ward No. 2 can be void only if it cannot be justified by the Board on the ground already stated by us. Whether it can be so justified will depend on evidence which is still to be produced in the case.

*Reference answered.*

(1) A.I.R. 1954 S.C. 465.

(3) A. I. R. 1956 S. C. 510.

(2) A.I.R. 1956 S.C. 246.

(4) A. I. R. 1957 S. C. 896.

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## SUPREME COURT

## APPELLATE CRIMINAL

*Before Mr. Justice Aiyar, Mr. Justice Gajendragadkar,  
and Mr. Justice Sarkar*

DAU DAYAL

v.

STATE OF UTTAR PRADESH

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

**Indian Merchandise Marks Act, 1889, s. 15—Limitation—**  
*Counterfeit Trade Marks, possession of—Complaint when  
to be filed.*

In view of s. 15 of the Indian Merchandise Marks Act, 1889 a private prosecutor charging an accused for being in possession of counterfeit trade marks should prefer his complaint within one year of the discovery of the offence.

Case-law discussed.

Criminal Appeal No. 118 of 1958 from the judgment and order dated the 14th May, 1958, of the Allahabad High Court in Criminal Revision No. 1594 of 1956 arising out of the order of the Additional Sessions Judge, Kanpur in Criminal Revision No. 13 of 1956.

The facts appear in the judgment.

*C. P. Lal*, Advocate, for the appellant.

*Gopi Nath Dikshit*, Advocate, for the respondent.

The judgment of the court was delivered by—

VENKATARAMA AIYER, J.:—The facts leading up to this appeal are these:

On 26th April, 1954, the appellant was arrested by the Sisamau Police for offences under ss. 420, 482, 483, 485 and 486 of the Indian Penal Code on the allegation that

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he was in possession of 25 packets of 'Chand Chhap Biri', which were alleged to bear counterfeit trade marks. On 26th May, 1954, one Harish Chandra Jain acting on behalf of Messrs. Mohan Lal Hargovind Das filed a complaint charging that the appellant was in possession of counterfeit bidis, wrappers and label and praying that a case under the sections above mentioned be registered and investigated. On that, the Magistrate passed the following order:

"S. O. Sisamau. Please investigate and register a case."

After investigation, the police submitted their charge-sheet on 30th September, 1954 and summons was ordered to the appellant on 22nd, July, 1955. On 17th September, 1955, the appellant filed an application before the Magistrate wherein he raised a preliminary objection that the proceedings were barred by s. 15 of the Indian Merchandise Marks Act, 1889 (4 of 1889), hereinafter referred to as the Act. That section provides:

"No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens."

The contention of the appellant was that the offence was discovered on 26th April, 1954, when he was arrested and the goods seized, and that, in consequence, the issue of process on 22nd July, 1955, was beyond the period of one year provided under s. 15 of the Act, and that the proceedings should therefore be quashed as barred by limitation. The Magistrate rejected this contention, and a Revision Petition preferred against this order to the Additional Sessions Judge, Kanpur, shared the same fate. The appellant then

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filed a further Revision Petition to the High Court of Allahabad, being Criminal Revision No. 1594 of 1956, and the same was heard along with other similar Revision Petitions by a Bench consisting of JAMES and TAKRU, JJ. By their judgment dated 13th May, 1958, the learned Judges held that the prosecution commenced when the compliant was presented on 26th May, 1954, and that as the discovery was on 26th April, 1954, the proceedings were within time under s. 15 of the Act. In view of the importance of the question raised, they granted leave to appeal to this Court under Art. 134 (1)(c) of the Constitution, and that is how the matter comes before us.

The point for decision is, when does a prosecution commence for purposes of s. 15 of the Act, whether on the date when the complaint is preferred, or when the process is issued thereon? The word "prosecution" is not defined in the Act, nor are there any provisions therein bearing on this question. Now, under the law and apart from statutory prescriptions a prosecution commences, where it is at the instance of a private prosecutor when the complaint is preferred. The position is thus stated in Halsbury's Laws of England, Vol. X, 3rd Edn., p. 340, para. 630:

"Criminal prosecutions, except where there are statutory provisions to the contrary, may be commenced at any time after the commission of the offence. A prosecution is commenced, when an information is laid before a justice, or, if there is no information, when the accused is brought before a justice to answer the charge, or, if there is no preliminary examination before a justice, when an indictment is preferred."

It is further stated there that different statutes provide for various periods of limitation within which a prosecution could be commenced after the commission of the

offence, and that three years is the period provided for an offence under the Merchandise Marks Act, 1887, which corresponds to the Indian Merchandise Marks Act, 1889. It is, therefore, settled law that unless there is something to the contrary in the statute, when a private complaint is presented it is the date of presentation thereof that marks the commencement of the prosecution.

Now, what is the nature of the prosecution under s. 15 of the Act? It is relevant in this connection to refer to ss. 13 and 14 which run as follows:

"S. 13. In the case of goods brought into India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act or section 18 of the Sea Customs Act, 1878, as amended by this Act, be *prima facie* evidence of the place or country in which the goods were made or produced."

"S. 14. (1) On any such prosecution as is mentioned in the last foregoing section or on any prosecution for an offence against any of the sections of the Indian Penal Code, as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the prosecutor or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were fine."

The object of the above provisions is to protect the rights of persons who manufacture and sell goods with distinct trade marks against invasion by other persons passing off their goods fraudulently and with counterfeit trade marks as those of the manufacturers. Normally, the remedy for such infringement will be by

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action in Civil Courts. But in view of the delay which is incidental to civil proceedings and the great injustice which might result if the rights of manufacturers are not promptly protected, the law gives them the right to take the matter before the Criminal Courts, and prosecute the offenders, so as to enable them effectively and speedily to vindicate their rights. It is for this reason that a short period of limitation is provided for their preferring a complaint under s. 15 of the Act, and there is also a special provision for award of the costs of the proceedings to or by the complainant.

In *Ruppell v. Ponnusami Tevan* (1), the question arose whether a prosecution launched by the complainant in 1898 in respect of goods sold and marked with what was alleged to be a counterfeit trade mark in 1893 was in time. In deciding that it was barred under s. 15 of the Act the Court observed as follows:

"Section 15 of the Merchandise Marks Act IV of 1889, enacts that no prosecution such as the present shall be commenced after the expiration of one year after the first discovery of the offence by the prosecutor. The reason for this limitation is clear.

Ordinarily the infringement of a trade mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed resort to the criminal courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal courts within a year of the offence coming to his knowledge, the

(1) (1899) I. L. R. 22 Mad. 488.

law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction."

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It will be noticed that the complainant is required to resort to the Court within one year of the discovery of the offence if he is to have the benefit of proceeding under the Act. That means that if the complaint is presented within one year of such discovery, the requirements of s. 15 are satisfied. The period of limitation, it should be remembered, is intended to operate against the complainant and to ensure diligence on his part in prosecuting his rights, and not against the Court. Now, it will defeat the object of the enactment and deprive traders of the protection which the law intended to give them, if we were to hold that unless process is issued on their complaint within one year of the discovery of the offence, it should be thrown out. It will be an unfortunate state of the law if the trader whose rights had been infringed and who takes up the matter promptly before the criminal court is, nevertheless, denied redress owing to the delay in the issue of process which occurs in Court.

The appellant relies on certain decisions as showing that the prosecution must be held to commence only when process is issued and not when complaint is filed. In *Sheikh Meeran Sahib v. Ratnavelu Mudali* (1), *De Rozario v. Gulab Chand Anundjee* (2) and *Golap Jan v. Bholanath Khettry* (3) cited by the appellant, the question was whether an action for damages for malicious prosecution would lie when the complaint was dismissed without notice to the plaintiff. It was held that the plaintiff could not be held to have been prosecuted unless process was issued to him and that where the complaint was dismissed without such process being issued, there was no prosecution and no action for damages in

(1) (1912) I. L. R. 37 Mad. 181. (2) (1910) I. L. R. 37 Cal. 358.

(3) (1911) I. L. R. 38 Cal. 880.

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respect of such prosecution would lie. These decisions have no bearing on the present question. In suits for damages for malicious prosecution, one of the points to be decided is, whether the plaintiff was in fact, prosecuted; and if he was, no question arises as to when the prosecution commenced. On the other hand, the point for decision in a prosecution under the Act is, not whether there was a prosecution but when it was instituted; and a question as to whether there was prosecution or not would be wholly foreign to it. Indeed, in an action for damages for malicious prosecution, when it is held that there was prosecution that could properly be held to have commenced when the complaint was filed and not when the process was issued. Vide the observations of WOODROFFE, J. in the course of the argument in *Golap Jan v. Bholanath Khettry* (1). The decisions in *Sheikh Meeran Sahib v. Ratnavelu Mudali* (2), *De Rozario v. Gulab Chand Anundjee* (3) and *Golap Jan v. Bholanath Khettry* (1) therefore do not throw any light on the matter now under consideration. It may be that these decisions may have to be reconsidered in the light of the recent decision of the Privy Council in *Mohamed Amin v. Jogendra Kumar Bannerjee* (4), wherein it was observed:

"The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results."

Vide also Ramaswami Iyer on The Law of Torts, 4th Edn., p. 318.

The decision in *R. R. Chari v. The State of Uttar Pradesh* (5) was relied on by the appellant as showing that until process was issued, there was no prosecution.

(1) (1911) I. L. R. 38 Cal. 880.

(2) (1912) I. L. R. 37 Mad. 181.

(3) (1910) I. L. R. 37 Cal. 358.

(4) L. R. [1947] A.C. 322, 331.

(5) 1951 S.C.R. 312.

There, the appellant was proceeded against the provisions of the Prevention of Corruption Act No. 2 of 1947. The Deputy Magistrate, Kanpur, issued a warrant for his arrest on 22nd October, 1947. Thereafter, on 6th December, 1948 the prosecution obtained the necessary sanction under the Act. The contention of the appellant was that the prosecution must be held to have been instituted against him on 22nd October, 1947 when he was arrested, that as no sanction for his prosecution had been obtained at that time, the proceedings were bad, and that the defect was not cured by sanction being obtained subsequently on 6th December, 1948. This Court held that under the special provisions of the Prevention of Corruption Act, the police had the power to arrest the appellant pending investigation and that was all the effect of the order of the Deputy Magistrate dated 22nd October, 1947, and that therefore there was no prosecution on the date of the arrest. But here, we are dealing with a private complaint, and as pointed out at p. 315 of the Reports, s. 190 (1) (a) of the Criminal Procedure Code would apply to such cases, and the Magistrate must be held to have taken cognizance when the complaint was received. This decision, in our opinion, does not assist the appellant; nor does the decision in *Gopal Marwari v. King Emperor* (1). There, considering ss. 200 and 202 of the Criminal Procedure Code, the learned Judges observed that there was a distinction between initiation of proceedings before the Magistrate and his taking cognizance of the same. It is sufficient to say that that is not the question which we have got to decide here, and on the language of s. 15 of the Act which is what we are concerned with in this appeal, all that is required is that a private prosecutor should prefer his complaint within one year of the discovery of the offence, and if that is done, the

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(1) (1943) I. L. R. 22 Pat. 433.

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bar under that section cannot apply. We agree with the decision of the learned Judges of the Court below that the proceedings are not barred by s. 15 of the Act. This appeal is accordingly dismissed.

*Appeal dismissed.*

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## CRIMINAL REVISION

*Before Mr. Justice Mulla\**

THAROO LAL AND ANOTHER

*v.*

STATE

**Master and Servant**—*Servant overstating the weights of carts—Duty of the servant vicarious liability of the master—Mens rea not essential—U. P. Sugarcane, (Regulations of Supply and Purchase) Rules, 1954, Rule 96(1) (f) and U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, s. 22, scope of.*

Ram Sunder Lal the weighment clerk of the Nawabganj Sugar Mills overstated the weights of the empty carts in order to secure wrongful gain for Tharoo Lal who is the occupier of the above sugar mill. Both were convicted under s. 22 of the U. P. Sugarcane (Regulation of Supply and Purchase) Act of 1953 for a breach of rule 96 (1) (f) of the U. P. Sugarcane (Regulation of Supply and Purchase) Rules of 1954.

*Held*, (i) that an offence under the U. P. Sugarcane (Regulation of Supply and Purchase) Act comes under those limited class of offences in which *mens rea* is not an essential element.

(ii) further that it is open to the legislature to absolutely prohibit any act and make an offender vicariously liable within the framework of the Constitution of India.

(iii) that if the occupier of the mill prefers to perform his duty (of taking the weights of the vehicle in which the case is brought) vicariously through a servant he can also be held vicariously responsible if the servant commits a breach.

(iv) also that it is the duty of the occupier to see that the weights of vehicles are rightly and correctly taken.

(v) that illegal act charged against, both the accused was one which was within the scope of the servant's duty and so the master can be held to be vicariously liable for the fault committed by the servant.

Case-law discussed.

\*Sitting at Lucknow.



Criminal Revision No. 132 of 1957 from an order of S. B. Banerjee, Sessions Judge of Gonda, dated the 5th April, 1957.

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The facts appear in the judgment.

*Iqbal Ahmad* and S. N. Roy, for the applicants.

Additional Government Advocate, for the State.

The judgment of the Court was delivered by—

MULLA, J.:—Sri Tharoo Lal, occupier of Nawabganj Sugar Mills, district Gonda, and Sri Ram Sunder Lal Tewari, the weighment clerk at Ragarganj purchasing centre of Nawabganj Sugar Mills, have been convicted under section 22 of the U. P. Sugarcane (Regulation of Supply and Purchase) Act of 1953 for a breach of rule 96 (1) (f) of the U. P. Sugarcane (Regulation of Supply and Purchase) Rules of 1954. Sri Tharoo Lal has been sentenced to a fine of Rs.1,000, in default five months' simple imprisonment, and Ram Sunder has been sentenced to a fine of Rs.500, in default three months' imprisonment. They have come up in revision against this order of conviction.

Briefly stated the facts of the case are that Sri Tharoo Lal is the occupier of Nawabganj Sugar Mills and Ram Sunder Lal, the other applicant, is the weighment clerk of the said mills at the Ragarganj purchasing centre. On the 24th March, 1955, Sri Man Singh, Sugarcane Inspector, Gonda, paid a surprise visit to the Ragarganj purchasing centre in order to check up the working at that centre. He came at about 4 p.m. and he found four empty carts there. The practice which is followed is that when the carts come laden with sugarcane they are weighed and then after removing the sugarcane the empty carts are weighed again. In this way the actual weight of the sugarcane is computed and this is recorded in the *parchis* which are given to the cane-growers who come with their carts. Payment is made to the cane-growers on the basis of these

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*parchis*. When Sri Man Singh came to the centre, he found there cartmen with four carts and he took their *parchis* from them. In order to check up that the weights were rightly recorded on the *parchis*, he weighed the empty carts. At that time no employee of the Nawabganj Sugar Mills was present and so Sri Man Singh himself weighed these carts. On weighment he found that the weight of the empty carts was wrongly recorded in all the three *parchis*. There was an overstatement of their weights varying from 10 to 25 seers in the case of every cart and the total difference came to 1 maund 25 seers. This indicated that the cane-growers would be robbed of the price of one maund and 25 seers of sugarcane and the Nawabganj Sugar Mills would wrongfully gain by this incorrect weighment. While, Sri Man Singh was weighing these carts Sri Kedar Nath, cashier, an employee of the Nawabganj Sugar Mills, came there and Sri Man Singh asked Sri Kedar Nath to weigh these carts again. Sri Kedar Nath did so and the weight found by Sri Kedar Nath tallied with the weight recorded by Sri Man Singh. Sri Man Singh thereupon asked Sri Kedar Nath to put down these weights which he had found on the *parchis* of the cartmen and sign them. Earlier Sri Man Singh had satisfied himself that the weighing machine was in order and it was functioning properly. He then took the statements of the three cartmen who were present there and as some of these cartmen were literate they wrote down their statements. He then served a notice upon the two applicants and as the replies were found to be unsatisfactory, he obtained the sanction of the Deputy Commissioner, Gonda, and prosecuted the two applicants.

In the appellate court it was contended on behalf of the applicants that the difference in weights found on reweighing of the empty carts by Sri Man Singh was due

to the fact that when the carts were first weighed in the morning by Ram Sunder Lal applicant, some other articles such as *sipawa*, *ulari* and ropes were also weighed which was not done when they were reweighed by the inspector. In other words the stand taken by the applicants was that the empty carts were correctly weighed but because they were not properly weighed by the sugarcane inspector this difference had arisen. This contention was rightly rejected by both the lower courts. They reached a finding that the empty carts were weighed in the same condition both by applicant Ram Sunder Lal and the inspector and their weights were deliberately overstated in order to make a wrongful gain. It is a finding of fact and I see no reason to disturb it. This contention was also not pressed before me. I am, therefore, satisfied that Ram Sunder applicant when he weighed the empty carts in the morning deliberately overstated the weight in order to secure a wrongful gain for the Nawabganj Sugar Mills. There was thus a clear breach of rule 96 (1) (f) of the U. P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954.

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I may at this stage quote the relevant parts of rule 96. It reads as follows:

"96 (1) An occupier of a factory or a purchasing agent shall prepare or cause to be prepared at each purchasing centre a *parcha* in triplicate showing correctly. . . . .

(f) the weight (tare) of the vehicle in which the cane was brought. . . . ."

It was conceded before me that a breach of this rule was committed and the only point contended before me was that as Sri Tharoo Lal was not present at the Ragaiganj purchasing centre when this weighment was made he cannot be held vicariously responsible for a

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criminal act done by his servant Ram Sunder. It is surprising that although this application purports to have been filed both on behalf of Sri Tharoo Lal and Ram Sunder Lal, yet in arguments the case of Sri Tharoo Lal was pressed and no serious attempt was made to defend Sri Ram Sunder Lal applicant. He was almost offered as a sacrifice so that Sri Tharoo Lal may not be convicted.

In deciding the question raised on behalf of Sri Tharoo Lal, I will first mention the facts which are not disputed. Sri Tharoo Lal was admittedly the occupier of Nawabganj Sugar Mills. This is also admitted that Ram Sunder Lal was his servant and it was within the scope of his duty to make weighment of the carts at the Ragarganj purchasing centre. The question whether the master can be held vicariously responsible for the acts of his servant should primarily be considered in the light of the statute. No doubt, the principle of *mens rea* is accepted by criminal courts but it is within the power of the legislature to make a certain illegal act or omission penal and fix an absolute liability upon any person if a breach of a certain enactment is made. Those on whom the duty is cast to interpret the statutes cannot ignore the purpose and object of an enactment. If the legislature expressly or in an implied manner has placed this vicarious responsibility on the master, the courts of law cannot question the discretion of the legislature by relying upon certain well recognized principles. Such general principles apply to all offences but it is within the power of the legislature to enact that an accused may be convicted without making a probe into his mind and without finding out whether he had knowledge of the crime that was committed or an intention of committing that crime. No doubt, these principles can be given up only where the language of the statute either clearly expresses the fastening

of the vicarious responsibility or it can safely be taken as implied. The question whether the statute has by necessary implication made the master liable depends upon several considerations. As held by MALIK, J. in *Harish Chandra Bagla v. Emperor* (1) this question should be answered on the following considerations.

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The learned Judge observed:

"Primarily it depends upon the language of the statute, the words used, then its scope, its object the nature of the duty laid down and whether it intends to impose a public duty binding on the master apart from any question of knowledge or frame of his mind. In many such cases the provision of the statute would be rendered nugatory if it be held that the prohibition or the duty imposed was not absolute."

The same view was again expressed by a Division Bench of this Court in *Gillumal v. King-Emperor* (2). This case was relied upon by the appellate court in deciding this question. It was a case under the U. P. Cotton Cloth and Yarn Control Order, 1943, and MULLA, J. observed:

"In our judgment section 6 prescribes certain duties which have to be performed by a manufacturer, selling agent, wholesale dealer or retailer in certain circumstances and it is only a manufacturer, selling agent, wholesale dealer, or retailer who can be called to account for failing to perform those duties. It is not in our judgment a good defence to say that the manufacturer, selling agent, wholesale dealer or retailer was not himself present when the provision of law was contravened. The duty lay upon him and it was for him to see that the duty was properly performed as required by the law. His presence or absence is in our judgment immaterial."

(1) A. L. R. 1945 All. 90.

(2) 1946 A. L. J. 143.

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The same view was also held in an earlier case in *Queen Empress v. Tyab Ali* (1). The learned Judges who decided the case remarked as follows:

"We fail to see how it can be contended that under these circumstances a delivery of goods by the man incharge would not be a delivery by the owner of the shop. It is not a question of intention, or *mens rea*, or of knowledge; it is the delivery which the Act makes penal, and the delivery by the manager is clearly in this case a delivery by the licensee."

The English decisions are also on the same line. In *Houghton v. Mundy* (2), Lord ALVERSTONE, C. J. observed:

"Having regard to the usefulness of the Sale of food and Drugs Act, I think it is most important that we should not throw any doubt upon the decision to the effect that want of guilty knowledge is no defence to a prosecution of this kind, and that if a servant acting within the scope of his authority commits an infingement of the Act the master is responsible."

Similarly in *Allen v. Whitehead*, (3) Lord HEWART, C. J. made the following observation:

"The principle seems to me to be that which was explained for example, in *Mousell Brothers Ltd. v. London and North-Western Railway Co.* (4) where ATKIN, J. (as he then was) said: 'I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principle is

(1) (1900) I. L. R. 24 Bom. 423.

(3) I. L. R. [1930] I. K. B. 211.

(2) (1910-'11) 103 L. T. 60.

(4) I. L. R. [1917] 2 K. B. 83.

liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

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The counsel for the applicants relied upon a Bench decision of the Calcutta High Court in *Varaj Lall v. Emperor* (1). The facts of that case are clearly distinguishable. In that case Varaj Lall, who was the owner of a motor vehicle was convicted under the Motor Vehicle Rules because his driver was driving the motor vehicle at an excessive speed even though Varaj Lall was not in the car at that time and he had instructed the driver not to exceed the regulation speed. It was observed in these circumstances by GREAVES, J.:

"The principle I should adduce from the cases is that, where a particular intent or state of mind is not of the essence of an offence, a master can be made criminally liable for his servant's acts, if an act is expressly prohibited but not otherwise, and that he cannot be so made liable, if the Act provides for liability for permitting and causing a certain thing, unless it can be shown that the act was done with the master's knowledge and assent, express and implied."

It would be seen that even in this decision it was clearly stated that where an act is expressly prohibited a master can be held vicariously responsible for the conduct of his servant if a particular intent or state of mind was not an essential ingredient of the offence. In the Calcutta case the rash driving by the driver was clearly his own

(1) (1924) I. L. R. 51 Cal. 948.

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individual act and the master could not possibly have gained any benefit by his rash conduct.

In Halsbury's Laws of England, Volume IX, at page 235 the following principle of law is laid down:

"The condition of mind of a servant or agent is not imputed to the master or principal so as to make him criminally liable. A master is not criminally liable merely because his servant or agent commits a negligent or malicious or fraudulent act. But in cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of a servant or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts defaults, and even where they were against his orders."

The calcutta case can, therefore, be no authority for holding that where the profit on account of a wrongful act accrues to the master and the act done was within the scope of duties assigned to the servant the master can plead that as he was not present at the time of the breach, therefore, no criminal liability can be fastened to him.

Two other cases were cited before me but they also do not support the contention advanced before me. These two cases are:

*Srinivas Mall Bairoliya v. Emperor* (1) and *Isak Soloman Macmull v. Emperor* (2).

The Bombay decision is based upon the Privy Council decision. The question was not really involved in the case but the Privy Council made an *obiter dicta*. Lord due Parcq commenting upon the view of the High Court observed:

"The High Court took the view that even if appellant (1) had not been proved to have known

(1) A. I. R. 1947 P. C. 135.

(2) A. I. R. 1948 Bom. 364.



of the unlawful acts of appellant (2) he would still be liable, on the ground that where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant."

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With due respect to the High Court, their Lordships think it necessary to express their dissent from this view. They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of WRIGHT, J. in *Sherras v. De Rutzen* (1). Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable with imprisonment for a term which may extend to three years. Their Lordships with the view which was recently expressed by the Lord Chief Justice of England, when he said:

"It is in my opinion of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

The Bombay High Court relying upon this Privy Council case dilated upon that view in the following words. CHAGLA, C. J. observed:

"According to the Privy Council it is not in every case of an absolute prohibition that no question of *mens rea* arises according to them it is only

(1) L. R. [1895] 1 Q. B. 918, 921.

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a limited and exceptional class of offences which can be held to be committed without a guilty mind. Further, according to them, these offences are of a comparatively minor character, and they expressed surprise—and it is almost a note of horror—that it could possibly be contended that offences under the Defence of India Act and the Defence of India Rules which are punishable with imprisonment for a period of three years could possibly fall within this limited and exceptional category of offences.”

These two decisions really are not in conflict with the decisions cited by me earlier. They only to certain extent modify the proposition that where there is an absolute prohibition the question of *mens rea* does not arise at all, and the master can be held to be liable for the acts of his servant. It seems to me that the proposition that where the legislature has either clearly or by necessary implication declared an act or omission to be an offence irrespective of the *mens rea* the Courts of law cannot go into this question cannot be seriously challenged. So far as the facts of this case are concerned, it cannot be seriously contended that the offence charged against the applicants does not fall within that limited and exceptional class of offences which can be held to be committed without a guilty mind. The maximum term of imprisonment which could be awarded under section 22 of the U. P. Sugarcane (Regulation of Supply and Purchases) Act, 1953, is six months. It is, therefore, clearly an offence of a minor character. In Halsbury's Laws of England, Volume IX, page 11 it is stated:

“In a limited class of offences, *mens rea* is not an essential element. This class consists, for the most part, of statutory offences of a minor and only quasi-criminal character and, in order to determine whether *mens rea* is an essential element of

an offence, it is necessary to look at the object and terms of the statute which creates it."

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In footnote (n) at that very page in order to illustrate this statement certain offences are mentioned. These offences include "Nuisance cases, Food and Drug cases, Licensing cases and the Miscellaneous cases." I am, therefore, of the opinion that even on the view expressed by the Privy Council and the Bombay High Court in *Isak Solomon Macmull's case* (1) it can safely be held that an offence under the U. P. Sugarcane (Regulation of Supply and Purchases) Act comes under those limited class of offences in which *mens rea* is not an essential element. It would be impertinent on my part to express any doubts against the view of law laid down in these two authorities. I am, however, of the opinion that it is open to the legislature to absolutely prohibit any act and make an offender vicariously liable. The only restriction upon the power of the legislature is the limitation placed upon it by the Constitution of India. So long as this absolute prohibition is made within the framework of the Constitution, I think that the Courts of law cannot question that absolute prohibition by raising the question of knowledge or intention. The Sugarcane (Regulation of Supply and Purchases) Act comes under those Acts which may be described as social legislation for the welfare of the community. Its object is to safeguard the interests of the poor cane-growers and rules have been framed so that the cane-growers may not be robbed of their just dues by the mill owners. The words of rule 96(1) (f) fix the primary responsibility upon the occupier and option is given to him that he may perform this duty either himself or through a servant. The words of the section clearly imply that the responsibility of taking the weight of the vehicle in which the cane was brought was fastened upon the occupier. If the occupier prefers to

(1) A. I. R. 1948 Bom. 364.

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perform this duty vicariously through a servant he can also be held vicariously responsible if the servant commits a breach. As I read the words of section 96(1) (f) I am satisfied that the duty is cast upon the occupier and it is for him to see to it that this duty is properly performed. It cannot be denied that when Ram Sunder Lal applicant weighed the empty carts he was doing so within the scope of his duty. It would have been a different matter if Ram Sunder had tried to obtain some illegal gratification from the cartsmen for giving some preferential treatment to any one of them. In such a case perhaps it would be an individual act of Ram Sunder Lal, as it would not fall within the scope of his duty. The test is whether the act done by the servant falls within the scope of his duty or not. If it falls, the master is vicariously responsible but if it does not fall the master cannot be held criminally liable. It was observed by TUDBALL, J. in *Emperor v. Behari Lal* (1):

“If it were an act done by the servants, then the conviction of the master would in the present case be a good one.”

On the evidence led in the case it could not be disputed that the illegal act charged against the applicants was one which was within the scope of the servant's duty and so the master can be held to be vicariously liable for the fault committed by the servant.

There is another aspect of the case. The conception of the welfare state necessitates an enactment of the kind, such as U. P. Sugarcane (Regulation of Supply and Purchases) Act. It is open to the legislature to adopt an objective approach in determining the liability of offenders. The law has a tendency of becoming more and more objective in the interests of the community which are given the top priority and the rights

(1) (1912) I. L. R. 34 All. 146.

and liberties of the individuals have to be curtailed. I, therefore, find nothing wrong in this objective approach made by the legislature. I have already observed above that in my opinion section 96 clearly implies that the occupier would be held responsible for any breach committed.

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So far I have merely discussed the legal aspect irrespective of the merits of the plea advanced on behalf of Sri Tharoo Lal. Even on merits this plea has no force. Where a servant commits a crime which brings wrongful gain to the master and not to the servant personally, the complicity of the master in the crime can safely be accepted. Sri Tharoo Lal examined no witnesses nor filed any document in support of the contention advanced on his behalf that the incorrect weighing made by Ram Sunder Lal was against his directions. This contention at best is only an argument for this is not the stand taken by him in his statement. He, on the other hand, contended that no incorrect weighing was made by Ram Sunder Lal. I am, therefore, of the opinion that the circumstances indicate that he not only knew that empty carts were being wrongly weighed at the Ragarganj purchasing centre but it is highly probable that this was being done on his directions in order to make a wrongful gain for the Nawabganj Sugar Mills.

I, therefore, find that the case is fully proved and established against both the applicants Sri Tharoo Lal and Ram Sunder Lal Tewari. This application of revision is dismissed. The fines imposed upon the applicants should be deposited within a period of one month from today.

*Revision dismissed.*

## CIVIL REFERENCE

Before Mr. Justice Jagdish Sahai and Mr. Justice  
Nigam\*

SHAMBHU NATH TANDON (APPLICANT.)

v.

<sup>1959</sup>  
January 21, THE MUNICIPAL BOARD, SITAPUR, THROUGH  
THE CHAIRMAN (OPPOSITE-PARTY)

**Municipalities**—*Trade, Callings and Vocations Tax—Assess-  
able income—Dearness Allowance, exemption of—Payment  
towards General Provident Fund and Contributory Provi-  
dent Fund and payment to the Insurance Company, deduc-  
tion of—U. P. Municipalities Act, 1916, s. 128 (i) (iii), assess-  
able income, scope of.*

A notification no. 2493/XXIII—57(47-48) was published in  
the *United Provinces Gazette*, dated 30th April, 1949 and it  
runs as follows:

"It is hereby notified under section 135(2) of the United  
Provinces Municipalities Act, 1916, that the Municipal  
Board of Sitapur in exercise of the powers conferred by  
section 128 (1) (iii) of the said Act, has imposed with effect  
from 1st May, 1949 a tax on the inhabitants of the Sitapur  
Municipality at the following rates:

On income from Rs.301 to Rs.600 at annas 8 per  
cent per annum.

On income from Rs.601 to Rs.999 at annas 12 per  
cent per annum.

On income from Rs.1,000 and above at Re.1 per  
cent per annum.

Subject to a maximum of Rs.50.

*Notes* (1)—Income means income earned or arising within the  
municipality.

(2) Property assessed to house tax under section 128  
(1) (i) of the said Act shall be exempt from the tax.

*Held*, that the sum of Rs.30 which the assessee is receiving as  
dearness allowance may be included while computing his in-  
come for the purpose of trade, callings and vocations tax men-  
tioned in s. 128 (1) (iii) of the U. P. Municipalities Act, 1916.

*Held*, also that the amounts paid by the assessee towards the  
General Provident Fund and the Contributory Provident Fund  
and also the amount paid as premiums to the National Insur-

\*Sitting at Lucknow.

ance Company cannot be deducted from the income of the assessee while computing his assessable income for the purpose of trade, callings and vocations tax mentioned in clause 3 of s. 128 of the U. P. Municipalities Act, 1916.

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Civil Reference No. 1 of 1950 made by B. P. Singh, Additional District Magistrate, Sitapur, dated, 12th April, 1950.

The facts appear in the judgment.

*J. S. Trivedi*, for the applicant.

*M. P. Srivastava* and Senior and Junior Standing counsels and *Umesh Chandra*, for the opposite-party.

The judgment of the Court was delivered by—

J. SAHAI, J.:—This is a reference made under section 162 of the U. P. Municipalities Act by the District Magistrate, Sitapur, for the decision of two questions in connection with the assessment of the tax on trades, callings and vocations on the appellant Shambhu Nath Tandon, who is the stenographer of the District Judge of that place and receives a salary of Rs.115 and a dearness allowance of Rs.30 per month. Under the provisions of section 128(iii) of the Act a Municipal Board can impose a tax on trades, callings and vocations, including all employments remunerated by salary or fees. The appellant is paying Rs.25 per month in the General Provident Fund, a sum of Rs.7 in the Contributory Provident Fund and a further sum of Rs.4-8 as premium for life insurance to the National Insurance Company. The questions that have been referred to us, are firstly, whether the amount of Rs.30 per month which the appellant is receiving as dearness allowance should be included in his income for the purposes of the assessment of the above-mentioned tax; and secondly, whether the amount which he pays towards General Provident Fund and the Contributory Provident Fund and to the National Insurance Company should be deducted, from the sum of Rs.115 for determining his income. Noti-

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fication No. 2493/XXIII—57(47-48) published in the *United Provinces Gazette*, dated 30th April, 1949, runs as follows:

It is hereby notified under section 135(2) of the United Provinces Municipalities Act, 1916, that the Municipal Board of Sitapur in exercise of the powers conferred by section 128 (1) (iii) of the said Act, has imposed with effect from 1st May, 1959, a tax on inhabitants of the Sitapur Municipality at the following rates:

On income from Rs.301 to Rs.600 at annas 8 per cent per annum.

On income from Rs.601 to Rs.999 at annas 12 per cent per annum.

On income from Rs.1,000 and above at Re.1 per cent per annum.

Subject to a maximum of Rs.50.

NOTE—(1) Income means income earned or arising within the municipality.

NOTE—(2) Property assessed to house tax under section 128(1) (i) of the said Act shall be exempt from the tax.

In the same issue of the *U. P. Gazette* are published the rules for the assessment and collection of the tax on trades, vocations and callings in the Municipality of Sitapur. On behalf of the Municipal Board it is contended that in the notification mentioned above the word used is "income" and not "salary" and the dearness allowance paid to the appellant will be included in the expression "income". The submission is that all that clause (iii) of rule 128 provides is that even employments remunerated by salary will be included in the expression "trades, callings and vocations" and there is nothing either in the notification or section 128 of the Municipalities Act



which provides that while computing the income of the appellant his dearness allowance should be excluded and the assessment should be made only on the net salary. It is true that dearness allowance is not salary. It is also true that the amount paid as dearness allowance will not be classed as salary while computing the pension of the assessee. Payments by way of dearness allowance are temporary in their nature and no sooner the cost of living would fall they are liable to be stopped. It is also true that no person has a right to dearness allowance, but it cannot also be denied that it is nonetheless an income. The word "income" has not been defined in the Municipalities Act or in the rules. In the Oxford English Dictionary its meanings are as follows:

"... That which comes in as the periodical produce of one's work, business, lands, or investments (commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation; revenue . . . ."

Neither in the Municipalities Act nor in the rules framed by the Sitapur Municipality there is any provision which may support the contention of the learned counsel for the assessee that dearness allowance should not be considered to be a part of the income of the assessee. As there is no decided case on the point this reference has got to be decided on first impressions only and it appears to us that the dearness allowance cannot be excluded while computing the income of the assessee for the purposes of the assessment of the tax. It has been strenuously contended by the learned counsel for the assessee that under clause (iii) of section 128 of the Act the words used are "including all employments remunerated by salary or fees" and inasmuch as dearness allowance is neither salary nor fees it is not liable to be included in income for the purposes of the assessment of the tax. We find it difficult to accept this argument

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because clause (iii) of section 128 of the Act does not provide that no amount except salary or fees can be taxed. All that it provides for is that even employments which are remunerated by salary or fees will be included in the terms "trade, callings and vocations" mentioned in clause (iii) of section 128 of the Act. The idea was to include such employments also as the services or professional callings like that of a lawyer or a doctor. Considering all the circumstances of the case we are of the opinion that the first question should be answered by saying that the sum of Rs.30 which the assessee is receiving as dearness allowance must be included while computing his income for the purposes of the tax.

As regards the second question, there is no provision either in the Municipalities Act or the rules which justifies exclusion of the amounts paid either by way of provident fund or as premium to the Life Insurance Company. It is true that in an assessment under the Indian Income Tax Act the assessee is entitled to rebate in respect of payments made towards provident fund or as premium up to a certain amount which varies with the income of the assessee but that is because there are provisions to that effect in the Income Tax Act. We have already said above that there are no provisions either in the Municipalities Act or the rules framed by the Sitapur Municipality which would justify the exclusion of the amounts paid as provident fund or as premiums, while computing the income of the assessee. Even under the provisions of the Indian Income Tax Act the amounts paid under these heads by an assessee are not excluded while computing his income for assessment. He only gets a rebate up to a certain amount. Under these circumstances it appears to us that while computing the assessable income the amount paid by the assessee towards the provident fund either general or contributory or the premium paid to the Life Insurance Company cannot

be excluded. It is true that the view we have taken may cause a little hardship, but considerations of hardship cannot prevail over the express language of the Act or the rules. We, therefore, answer the second question by saying that the amounts paid by the assessee towards the general provident fund and the contributory provident fund as also as premium to the National Insurance Company cannot be deducted from the income of the assessee while computing his assessable income.

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*Reference disposed of.*

### CIVIL REFERENCE

*Before Mr. Justice Mukerji and Mr. Justice Nigam.\**

VISHVA NATH SINGH, KUNWAR (APPELLANT)

v.

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January 23.

STATE (OPPOSITE-PARTY)

**Agricultural Income Tax**—Loss under s. 6 (2) (b) of the *Agricultural Income Tax Act, 1948 as amended in 1953*.  
Set off—Income under s. 5 of the *Agricultural Income Tax Act, 1948 as amended in 1953*—Total *Agricultural Income, determination of—U. P. Agricultural Income Tax Act, 1948 as amended by Act of 1953, s. 2(16), scope of.*

*Held*, that in computing the total agricultural income on which an assessee is chargeable to agricultural income-tax any losses which he may sustain in any of the two sources (i.e. income under ss. 5 and 6 of the Act) which go to make up his total agricultural income have to be set off against the total earnings of the two sources (i.e. under ss. 5 and 6 of the Act) of the assessee.

*Province of Bihar v. Raja Bahadur Harihar Prasad Narain Singh of Raj Amawan* (1), relied on.

Civil Reference No. 4 of 1957 under section 24(4) of the U. P. *Agricultural Income Tax Act* against the refusal of the Revision Board to state a case for the opinion of this Court.

\*Sitting at Lucknow.

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v.  
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The facts appear in the judgment.

S. C. Das, for the appellant.

Standing Counsel, for the State.

The judgment of the Court was delivered by—

MUKERJI, J.:—On the 27th February, 1956, a Bench of this Court directed the Board of Agricultural Income-tax to state a case. The Board has in accordance with that direction stated the case. This statement covers cases of three assessees which were referred to as References Nos. 310, 311 and 312 of 1956. These assessments related to district Sitapur. All these references raise the same question. The question of law which was raised at the time when this Court directed the statement of case by the Board was formulated thus:

“Whether the loss incurred by the assessee under section 6(2) (b) should be set off against the income under section 5 of the Agricultural Income Tax Act to determine the total agricultural income of the assessee?”

Under section 2(16) the phrase “total agricultural income” has been defined thus:

“‘total agricultural income’ means the aggregate of the amounts of agricultural income of the different classes specified in sections 5 and 6 determined respectively in the manner laid down in the said sections and includes all receipts of the description specified in clauses (a), (b) and (c) of sub-section (1) of section 2 . . . .”

Section 5 provides for the determination of agricultural income while section 6 provides for the computation of the agricultural income of a kind which is not determinable under section 5 or which would not come for determination under section 5. It is, therefore, clear that total agricultural income in accordance with the

definition contained in section 2(16) of the Act is the aggregate of the income under section 5 and income under section 6. Further, it is clear that it is income that is taxed. The question which has to be determined is what is income. Income must be something which is left over after the permissible expenditures, for in order to have an income one has to have a surplus out of the venture whatever the nature of that venture.

The controversy between the parties was that according to the department the permissible deductions provided for under section 6 of the Act were to be allowed and could be taken advantage of only up to a point when that expenditure equals the return : in other words what was contended was that if the expenditure—the permissible expenditure exceeded the return, then that expenditure which was in excess of the income was to be completely ignored in determining the total income of the assessee.

Under section 6 the income contemplated is the gross proceeds of sale of all the produce of the land subject to the deductions enumerated in sub-clauses (i) to (xiii) of section 6(2) (b). What has to be seen is whether if the permissible deductions under section 6(2) (b) not only swallowed up, so to speak, the gross proceeds and left an overall loss, then that loss had to be accounted for when the assessee's total income was being determined under the definition as contained in section 2(16) for assessing the tax payable under section 3 of the Act.

If the contention of the department were to be accepted as put forward on their behalf by Sri *Uma Shankar Srivastava*, then the position would be that in effect there would be a taxation of each source separately and not an overall taxation of the total agricultural income. It was contended that there was no provision in the Agricultural Income Tax Act like what was provided for in the Income Tax Act by section 24(1). It is true that

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there is no such provision in the Agricultural Income Tax Act but, nevertheless, reference to the provisions of the Act to which we have already referred, clearly indicates that what was taxable under the Agricultural Income Tax Act was the total income of an assessee derivable from certain sources mentioned in the Act and that the income was to be determined after allowing certain deductions which were permissible. Therefore, before one could actually find what an assessee's total income was from the various sources one had to keep an account of the gains and losses sustained by the assessee under the various heads which were, apparently for good reason, dealt with in two separate sections of the Act, *viz.* sections 5 and 6 respectively. We could see the logic for the separate treatment of the two sources of agricultural income because, apart from these two sources being of different natures, the deductions which were permissible under these two separate sources had to be different.

A man's income cannot be split up into different units according to the source of its accrual. Nor can the expenditure which he incurs to make his earnings from the different sources be kept separate and confined only to a particular source when considering the overall position of a man's income. If, therefore, the expenditure side under one head exceeds the income under that head, then the excess of the expenditure has got to be accounted for when the man's ultimate income from all the sources is determined, because it is quite clear to us that no one can be said to have an income when he has in effect not made any.

From what we have said above we are of the opinion that in computing the total agricultural income on which an assessee is chargeable to agricultural income-tax any losses which he may sustain in any of the two sources which go to make up his total agricultural income have to be set off against the total earnings of the two sources

of the assessee. We may here point out that the view that we have taken receives support from a Full Bench decision of the Patna High Court in *Province of Bihar v. Raja Bahadur Harihar Prasad Narain Singh of Raj Amawan* (1) where it was held that "when an assessee is being taxed on his total agricultural income, calculation should be made by adding up his gross receipts from all the villages and by deducting from it the total expenditure which is allowed to him by section 6, the difference will be his total agricultural income which will be assessable if it exceeds Rs.5,000. If the income of the assessee is also derived from land which is in his actual cultivation or which is let out by him on produce rent, the income which he gets is still agricultural income though in such a case the Act provides by section 7 a mode of calculating the income and also provides for similar deductions as in a case falling under section 6 provided the deductions are not allowed twice over. But the gross incomes must be added up and also the proper deductions as stated above."

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We may point out that the Bihar Agricultural Income Tax Act was almost in the same terms as the U. P. Agricultural Income Tax Act. In the Bihar Act too there was no specific provision, at the time at any rate, when the decision in the *Province of Bihar v. Raja Bahadur Harihar Prasad Narain Singh of Raj Amawan* (1) was given which could correspond to a provision like what was contained in section 24(1) of the Income Tax Act.

In the end we should like to point out that the interpretation which the Agricultural Income Tax Department wanted us to put on the statute was not the natural or the normal interpretation. It is a well-known principle of interpretation that when construing a fiscal statute the Court has to lean in its interpretation in favour of the subject rather than in favour of the State.

(1) A. I. R. 1942 Pat. 276.

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In this particular case, however, in our opinion, there was no question of leaning in favour of the subject, for in our view the interpretation which has found favour with us is the true interpretation of the statute.

For the reasons given above we answer the question formulated in the reference in the affirmative. This answer will cover all the three references, namely References Nos. 310, 311 and 312 of 1956 mentioned in the Board's order dated the 13th March, 1957. The assessee is entitled to his costs of all the three references which we assess at Rs.100 in respect of each reference.

*Reference disposed of.*

## CRIMINAL REVISION

*Before Mr. Justice Desai*

GYANENDRA NATH MITTAL

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**Drugs stocked and exhibited for sale**—*Substandard quality of*  
—*Failure of Government Analyst to give protocols of test*  
—*applied—Effect of, on prosecution—Drugs Act, 1940 ss. 25,*  
27—*United Provinces Drugs Rules, 1945, R. 46.*

Omission of the Government Analyst to give full protocols of test applied amounts to a fatal defect in the prosecution since it seriously prejudices the accused in so far as he is unable to avail of his right, within the prescribed time, to challenge and to controvert the conclusiveness of the report on the quality of the drugs stocked and exhibited by him for sale.

Criminal Revision No. 830 of 1957 from an order of B. Sinha, Sessions Judge, Garhwal dated 28th June, 1957 in Criminal Appeal No. 52 of 1956.

The facts appear in the judgment.

*L. Chaudhary*, for the applicant.



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DESAI, J.:—The applicant has been convicted under section 27 of the Drugs Act for stocking and exhibiting for sale a drug, namely, tincture zingiberis mitis which was not of standard quality. There is the report of the Government Analyst to the effect that the sample of tincture zingiberis mitis taken from the applicant's shop was substandard. Section 25 of the Act requires that the Government Analyst to whom a sample of a drug is submitted for analysis should deliver to the Inspector submitting it a signed report in the prescribed form and lays down that a document purporting to be a report signed by a Government Analyst is evidence of the facts stated therein and is conclusive unless the person from whom the sample was taken has, within 28 days of the receipt of a copy of the report, notified in writing to the Inspector or the court that he intends to adduce evidence in controversion of the report. Rule 46 of the United Provinces Drugs Rules, 1945 lays down that after the test or analysis the result of the test or analysis together with full protocols of the test shall be supplied forthwith to the sender in Form 13. The Government Analyst's report is in Form 13. It has column No. 7 "result of test or analysis with protocols of tests applied". In that column the Government analyst has simply stated the result of the test but has not given the protocols at all. He has not mentioned what tests were applied and, therefore, the result is not in the prescribed form. When it is not in the prescribed form it cannot be conclusive evidence of the facts stated therein. The failure to give the protocols is a fatal defect because it deprives the person from whom the sample was taken of his valuable right of giving notice under section 25 to the Inspector or the court that he intends to adduce evidence in controversion of the report. If he does not know the protocols of the test or analysis, he cannot decide whether he

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should adduce evidence in controversion of the report and he is seriously prejudiced and his conviction cannot be maintained. I, therefore, allow this application, set aside the applicant's conviction and sentence and acquit him. His bail bonds are discharged and the fine, if realised, shall be refunded.

Let this defect in the Government Analyst's report be brought to the notice of the State Government.

*Application allowed.*

### CRIMINAL REVISION

*Before Mr. Justice Desai.*

MOHAMMAD MANSOOR

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v

HIRA SINGH AND ANOTHER

**Compoundable offence—Prosecution for—Plea of composition in—Jurisdiction of court to proceed with trial—Code of Criminal Procedure, 1898, ss. 345 and 403.**

When an offence is duly compounded it must result in the automatic and instantaneous acquittal of the accused. Wherefore if an accused pleads that the offence has been lawfully compounded the Court has no jurisdiction to proceed with the trial without adjudicating upon the alleged composition.

Criminal Revision No. 904 of 1958, from an order of S. Mubarak Hasan, Additional District Magistrate (J), Jhansi dated 14th May, 1958.

The facts appear in the judgment.

*P. C. Chaturvedi*, for the applicant.

*M. M. Chaturvedi*, for the opposite-party.

DESAI, J.:—A case under sections 324 and 506 Indian Penal Code was instituted by the opposite-party no. 1 against the applicant. When the applicant appeared in

court he applied to the Magistrate for acquittal on the ground that the offence had been compromised at home. The application was not accepted by the Magistrate and he proceeded to record the evidence of the complainant and on 5th February, 1958 framed a charge under section 323 Indian Penal Code which is compoundable. Then the case was transferred to another court where the applicant applied again for acquittal on the ground of the compromise. The Magistrate refused to go at once into the question whether the offence had been compounded or not and said that he would proceed with the trial and decide the question at the end of the trial.

It is not understood why the Magistrate refused to decide at once the question whether there has been any compromise or not. Though the prosecution was for the offences of sections 324 and 506 since only a charge under section 323 has been framed against the applicant I take it that the offence alleged to have been committed by him is that of section 323 Indian Penal Code only. As soon as that offence was compounded with him by opposite-party no. 1 he became entitled to be acquitted. It is laid down in section 345(6) Criminal Procedure Code that the composition of an offence has the effect of acquittal of the accused with whom the offence has been compounded the effect is automatic. Wherever composition of an offence takes place it has instantaneous effect of acquittal of the accused. Once the accused is acquitted he cannot be tried again for the same offence, vide section 403 of the Code. When it was contended before the Magistrate that the applicant stood acquitted on account of composition of the offence, it meant that his trial was barred by section 403 Criminal Procedure Code and it was the duty of the Magistrate to decide the matter at once. The Magistrate was, therefore, bound to decide the question of the composition of the offence as soon as it was raised and he had no jurisdiction to

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defer it till the end of the trial. He could not proceed with the trial if it was barred by section 403 Criminal Procedure Code. If it was contended before him that the trial was barred he could proceed with it only after overruling the contention. Consequently in the present case the Magistrate could not proceed with the trial unless he decided that there was no composition.

I allow the application, set aside the order of the Magistrate dated 11th March, 1958 and direct him to decide the question whether the offence of section 323 has been compounded with the applicant by the injured persons or not.

*Application allowed.*

### APPELLATE CIVIL

*Before Mr. Justice Beg and Mr. Justice Nigam.\**

SOHAN LAL AND OTHERS—(DEFENDANTS)

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SMT. CHHABINATHA AND OTHERS (PLAINTIFFS)

**Sale—Arrears of Income Tax—Sale by Tahsildar—Sale Certificate and possession issued by the Tahsildar—Sale Certificate, validity of—U. P. Land Revenue Act, 1901, ss. 174, 177 and s. 233 (1) (m), scope of.**

*Held*, (1) that where there are arrears of income-tax against an assessee, they would be realisable as arrears of land revenue, the procedure for recovery of such arrears is provided in ss. 154, 174 and 177 of the United Provinces Land Revenue Act.

Where a house is sold for arrears of income tax and the circumstances indicate that the Collector had not put the purchaser into possession of the property and the Sale certificate itself was not issued by the Collector but it was issued by the Tahsildar who was not competent to perform the act, the sale must be regarded as nullity in the eye of law, illegal and void.

(ii) that in a case of sale for arrears of income tax the sale is to be confirmed by the Commissioner of sale by the court of

*\*Sitting at Lucknow.*

Tahsildar was *ultra vires*, null and void and cannot convey any title in the property sold.

(ii) that s. 177 authorises the Collector and the Collector alone to issue such a certificate and does not make any provision for delegation of his power in this regard by him and where the sale certificate is issued by the Tahsildar there is a clear contravention of the mandatory provisions of law and the document in question does not comply with the requirements of s. 177 of the United Provinces Land Revenue Act.

(iv) that it is difficult to invoke illustration (1) of s. 114 of the Indian Evidence Act for the purpose of holding that the act itself was regularly performed when the regular performance of the official act is not proved.

Section 233 (1) (m) of the United Provinces Land Revenue Act indicates that it is the plaintiff who is barred from instituting a suit on the ground envisaged in that section. The section is not meant to cover a plea of a defensive nature at all.

Case-law discussed.

Special Appeal No. 8 of 1954 against the decree of Randhir Singh J. dated 15th July, 1954.

The facts appear in the judgment.

*Niamatullah, N. Banerji and Inayatullah*, for the appellants.

*S. C. Das, M. L. Tewari and K. S. Varma*, for the respondents.

The judgment of the court was delivered by—

BEG, J.:—This is a special appeal. It has been filed by three persons *viz.* (1) Sri Sohan Lal, (2) Lala Jagannath and (3) Gopal Krishna. All these three persons were defendants in the trial court, Jagannath and Gopal Krishna are the sons of one Chunni Lal. The property in dispute in this case is house no. 613 and its appurtenances which are situate in muhalla Beruni Khandak in the city of Lucknow. Admittedly the owner of this house, along with another house with which we are not concerned in this case, was Chunni Lal, the father of Jagannath and Gopal Krishna, appellants nos. 2 and 3 in this appeal. This house was mortgaged by Chunni Lal and his son Jagannath to one Shrimati Champo on the 1st June, 1927. Subsequently, it appears that certain

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arrears of income-tax had accumulated against Chunni Lal and the house in dispute along with the other house of Chunni Lal was sold for the realisation of these arrears. The realisation of the arrears of income-tax should, under section 46 of the Income Tax Act, be made according to the procedure prescribed for realisation of arrears of land revenue. This house was accordingly sold on the 24th July, 1931. The auction purchaser was Raja Ram Bhargava. Ex. 4 is the sale certificate which was issued by the Tahsildar on the 21st November, 1931. The main question that has been agitated in this case is as to how far Ex. 4 the sale certificate in respect of this house, is a valid and effective document. On the 12th January, 1932, the Tahsildar, who is said to have conducted the sale, delivered possession of the house to the auction purchaser, viz. Raja Ram Bhargava. On the 26th July, 1933, Raja Ram Bhargava brought a suit for realisation of arrears of rent and ejectment against Chunni Lal. This suit was dismissed on the 21st November, 1936, Raja Ram Bhargava sold his rights in favour of Behari Lal. On the 24th September 1937, the mortgagee rights in the property in dispute were purchased by Sohan Lal. On the 30th August, 1940, Behari Lal sold the house in dispute to one Ram Ghulam, who was the original plaintiff in the case. On the 31st August, 1940, i.e. just a day after the purchase of the house by Ram Ghulam, Sohan Lal brought a suit on the basis of the mortgage deed. On the 24th March, 1941, Sohan Lal succeeded in obtaining a decree in the suit. It may be mentioned that in this suit Behari Lal was a party but Ram Ghulam was not a party. On the 1st May, 1943, Sohan Lal purchased the equity of redemption from Jagannath and Gopal Krishna, the sons of Chunni Lal, and Shrimati Godawari, the widow of Chunni Lal. On the 4th May, 1943, Ram Ghulam brought the present suit for possession of the property

in dispute. In this suit Sohan Lal was not impleaded. Subsequently, however, the plaintiff impleaded Sohan Lal, who was made defendant no. 7 in the suit. Defendants nos. 1 and 2 in the suit were Jagannath and Gopal Krishna, the sons of Chunni Lal. Defendant no. 3 was Shrimati Godawari, the widow of Chunni Lal. Defendants 4 to 6 were Majid, Ibrahim and Behari Lal, who were said to be the tenants of the house in dispute.

The plaintiff claimed title to the house in suit on the basis of the sale-deed executed in his favour by Behari Lal on the 30th August, 1940. As already mentioned above, Behari Lal himself was the transferee of Raja Ram Bhargava the auction purchaser of the said house in the sale of the same for the realisation of the arrears of income-tax.

The suit was contested mainly by Sohan Lal. The three pleas raised by Sohan Lal were, firstly that the sale of the house held on the 24th July, 1931, was void and inoperative in view of the fact that there was no compliance with the mandatory provisions of sections 164, 174 and 177 of the United Provinces Land Revenue Act. Secondly, it was contended that the transfer in favour of the plaintiff was made to defraud or to delay the creditors. It was also alleged in this connection that the transfer itself was fictitious and collusive. Thirdly, it was pleaded that the suit of the plaintiff was barred by limitation, and further that the contesting defendant had acquired ownership by adverse possession.

The trial court came to the conclusion that the sale held on the 24th July, 1931, was a valid sale. It was duly confirmed by the Commissioner. It further held that the transfer in favour of the plaintiff was hit by the provisions of section 53 of the Transfer of Property Act. On the question of limitation it was of opinion that the suit was within limitation. The trial court, accordingly, decreed the plaintiff's suit with costs.

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In appeal, the judgment of the trial court was reversed. It was held that the sale in question was incompetent and void. It was also held that the sale in favour of Ram Ghulam was made with an intent to defeat or defraud the creditors and therefore, under section 53 of the Transfer of Property Act, the sale was bad in law and voidable at the option of the creditors. No finding was given on the question of limitation. The appeal was, accordingly allowed. The judgment of the trial court was set aside and the plaintiff's suit was dismissed with costs.

A second appeal was filed against the said judgment on behalf of the plaintiff. This appeal came up for hearing before a learned single judge of this Court. The learned Judge was of the opinion that the sale of the house in suit was not void. In this connection he was of opinion that the presumption of the regularity of official acts applied to the present case. He was further of opinion that section 53 of the Transfer of Property Act did not apply to the facts and circumstances of the present case. On the question of limitation, however, he did not give any finding. Before him the Counsel for the plaintiff stated that his client was willing to pay the money due to Sohan Lal under the mortgage decree obtained by him. As, however, Sohan Lal had entered into possession of the mortgaged property in spite of the fact that the mortgage itself was a simple one, the plaintiff submitted that the amount realised by Sohan Lal as rent should be set off towards the amount due under his mortgage decree. In view of the fairness of this offer, the learned Judge accepted this position. He, accordingly, allowed the appeal and decreed the plaintiff's claim for possession on payment of the amount due to Sohan Lal under his mortgage decree after setting off against it the rent realised by him. He accordingly, remanded



the suit to the trial court for ascertaining the said amount.

Dissatisfied with the said judgment, this special appeal has been filed by Sohan Lal, who was defendant no. 7, and the two other appellants who had figured as defendants nos. 1 and 2 in the trial court.

At the very outset the learned counsel for the appellant has argued that the view of the learned single Judge that the sale of the house in suit was not void is an erroneous one. In this connection he has invited our attention to section 46 of the Income Tax Act. Section 46 (2) of the Act provides that where there is an arrear of income-tax against the assessee, it would be realizable as an arrear of land revenue. The procedure for recovery of an arrear of land revenue is prescribed in Chapter VIII of the U. P. Land Revenue Act. The three sections of the Land Revenue Act which are relevant for the purposes of this case are sections 164, 174 and 177. Section 164 provides as follows:

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“Every sale under this chapter shall be made either by the Collector in person or by an Assistant Collector specially appointed by him in this behalf”. (The remaining portion is omitted as not relevant. Section 171 of the U. P. Land Revenue Act provides that every sale of land or other immovable property under the said Act shall be reported by the Collector to the Commissioner. Section 172 deals with the application to set aside the sale on deposit of arrears, etc., and section 173 deals with an application to set aside the sale for irregularity, etc. Then follows section 174, which provides as follows:

“On the expiration of thirty days from the date of the sale, if no such application as is mentioned in section 172 or 173 has been made, or if such application has been made and rejected, the Commissioner shall pass an order confirming the sale;

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and, if such application under section 173 is made and allowed, the Commissioner shall pass an order setting aside the sale.

Every order under this section shall be final."

It has been strenuously argued before us that in the present case there was no compliance with the mandatory provisions of this section in so far as no order confirming the sale was passed by the Commissioner, as required by this section.

Section 177 runs as follows:

"After a sale of land or other immovable property under this Act has been confirmed in the manner aforesaid, the Collector shall put the person declared to be purchaser into possession of such property, and shall grant him a certificate to the effect that he has purchased the property to which the certificate refers, and such certificate shall be deemed to be a valid transfer of such property, but need not be registered as a conveyance except as provided by section 89 of the Registration Act, 1877."

(The remaining portion is omitted as irrelevant.)

In this connection it has been argued before us that in the present case the circumstances indicate that the Collector had not put the purchaser into possession of the property, and what is more important is the fact that the sale certificate itself was not issued by the Collector but that it was issued by the Tahsildar who was not competent to perform the said act. Under these circumstances, it is argued that this mandatory provision of law was also contravened and the sale in question was again bad in law on this ground also.

Having heard learned Counsel for the parties on this aspect of the matter, we are of opinion that this appeal should be allowed. In order to appreciate the arguments of the learned counsel in this case it is necessary

to turn to Ex. 4, which is the sale certificate, with a view to ascertain as to how far the criticisms levelled against the validity of the said sale are borne out by this document. It may be mentioned at the very outset that the heading of this sale certificate states as follows:

*"Certificate nilam jaidad ghair manqula mah-kuma Order XXI qaida 94 majmua zabta Diwani 1908 (Sale certificate of immovable property under Order XXI, rule 94 of the Code of Civil Procedure, 1908)."*

The above recital which forms the heading of the sale certificate points to the conclusion that the authority responsible for the issue of the sale certificate was under the impression that the sale was being conducted under Order XXI rule 94 of the Code of Civil Procedure. It is obvious that the sale in the present case was to be conducted according to the method prescribed for the realization of arrears of land revenue. According to this method, the sale was to be governed not by Order XXI rule 94 of the Code of Civil Procedure or by any provision in the Civil Procedure Code at all, but by the provisions of the U. P. Land Revenue Act. The reference, therefore, to the aforesaid provisions of the Civil Procedure Code indicates that the authority concerned was under a misapprehension as to the provisions of law which governed the sale in the present case.

A subsequent portion of the sale certificate refers to the proceedings that were before the Court in the following words:

*"Muqadma number mutafarraquat baqaya Income Tax 1930 Isvi (case numbered as Miscellaneous Case relating to arrears of Income-tax, 1930).*

The above reference also indicates that the Court was treating this matter as a miscellaneous case before it. Later on in the same sale certificate it is recited as follows:

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*"Aur nilam mazkur hasb zabta adalat se manzoor hua."*

(The above-mentioned sale has been confirmed by the Court in accordance with law.)

On behalf of the appellant it has been argued that there is a clear reference to the *adalat* (Court) as the confirming authority. The word "*adalat*" could not possibly cover "Commissioner". Under section 174 of the U. P. Land Revenue Act, it is mandatory that this sale should have been confirmed by the Commissioner. The Court mentioned in this sale certificate can only be the Court of the Tahsildar, where the sale was being held and which was purporting to issue the sale certificate. It may be mentioned in this connection that this is the very Court which had registered the case before it as a miscellaneous case. On the other hand, on behalf of the respondent it has been argued that the word "*adalat*" (Court) was loosely used in the above recital and reliance in this connection is placed on the words "in accordance with law." It is argued that the proper legal authority to give the sanction was the Commissioner, and, in view of the fact that it is recited that the Court which was authorized by law had made the confirmation, it should be presumed that the confirming authority was the Commissioner and not the Tahsildar. We find it difficult to accept this contention. We have already observed that the authority issuing the sale certificate had prominently referred to the provisions of the Code of Civil Procedure and had further particularly, referred to the provisions of Order XXI rule 94 of the Code as the provision which governed the sale proceedings in the specific case. The same authority had referred to the proceedings before it as "a miscellaneous case." It may further be mentioned that the heading of this application also recites that this case was in the Court of Tahsildar. The relevant words are as follows:

"Ba adalat Janab Tahsildar Sahib Bahadur,  
muqam Lucknow."

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(In the Court of the Tahsildar Sahib Bahadur, Lucknow). The above circumstances, in our opinion, clearly point to the conclusion that the words "in accordance with law" used in this context refer to the law mentioned in the preceding portion of the same sale certificate. This law is the law comprised in the Civil Procedure Code. It is further reasonable to infer that "the *adalat*" or the Court mentioned in the closing portion of the sale certificate is the same Court or *adalat* which is mentioned in the earlier portion of the sale certificate. This, as we have already mentioned, is the Court of Tahsildar. This fact is further borne out by the portion of the sale certificate which follows the above endorsement. It is as follows:

"*Aj batarikh 21 mah November, san 1931 ko mere dastkhat aur mohar adalat se harwalā kiya gaya.*" (Given under my signature and seal of the Court, this 21st day of November, 1931).

In this portion again the authority has referred to itself as a Court, and as the authority which was appending its seal for the purpose of verifying the said sale certificate. This is further borne out by the fact that the seal actually appended to the sale certificate is that of the Court of the Tahsildar and below the signature of the authority is the designation of the officer signing the sale certificate. In this designation the authority is described as the Tahsildar Sahib Bahadur, Lucknow. The signature itself is not quite legible, but a reference to the Civil List of United Provinces of Agra and Oudh of July 1, 1931, leads us to think that most probably it is the signature of M. Muhammad Yusuf Ali Ansari, who is shown therein to be the Tahsildar of Lucknow Tahsil at the relevant period.

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It may further be noted in this connection that this sale certificate also refers to the authority which had directed the sale as the Deputy Commissioner. This is shown in a note made at the top of the sale certificate. This note is as follows:

"NOTE:—*Deputy Commissioner Sahib Bahadur Lucknow ki manzoori muarrakha 14th July 1931 Isvi ke bamaujib nilam kiya gaya.*"

(The sale was being held under the sanction of the Deputy Commissioner sahib Bahadur, Lucknow, dated 14th July, 1931).

The above note clearly indicates that the authority that framed the sale certificate had in its mind a distinction between the Court where the sale was being conducted, and other authorities like the Deputy Commissioner, etc., who were responsible for giving the permission for sale. In this situation one would expect that if the confirmation was made by the Commissioner, the writer of the sale certificate would have described the confirming authority as "the Commissioner" and not as "the Court." The entire contents of the sale certificate thus indicate that the word "Court" in the sale certificate refers to the Court of the Tahsildar which had held and conducted the sale and which was granting the certificate in question.

The above consideration lead us irresistibly to the conclusion that the authority that confirmed the sale in question must have been no authority other than the Tahsildar in whose Court the sale was held. The above conclusion is arrived at, not by virtue of any presumption under section 114, Illustration (e) of the Indian Evidence Act; but as a result of the intrinsic evidence and circumstances disclosed by the contents of the sale certificate itself. Once this conclusion is reached, it has to be held that the sale in question was confirmed by an

authority which was absolutely incompetent to perform the act of confirmation. Section 174 of the U. P. Land Revenue Act clearly states that the sale shall be confirmed by the Commissioner. The confirmation of the sale by the Court of Tahsildar was, therefore, obviously *ultra vires*, null and void, and could not convey any title in the property sold. Such a sale must, therefore, be regarded as a nullity in the eye of law, illegal and void.

Regarding section 177 of the U. P. Land Revenue Act, we are again of opinion that this provision of law was also clearly contravened. This section lays down that after the sale is confirmed, the Collector shall put the person declared to be the purchaser into possession of such property. Ex. 9 is the warrant of delivery of possession filed in this case. It indicates that the person who put the purchaser in possession was not the Collector but the Tahsildar. Section 177 of the Land Revenue Act further lays down that the same authority, i.e., the Collector shall grant the purchaser a certificate to the effect that he has purchased the property to which the certificate relates, and such certificate shall be deemed to be a valid transfer of such property. In the present case it has to be conceded that the certificate in question was not issued or granted by the Collector, as it was obviously granted by the Assistant Collector, i.e., the Tahsildar. The learned single Judge's finding is also to the same effect.

The learned single Judge has, however, taken the view that the Assistant Collector could have granted this certificate as section 164 of the U. P. Land Revenue Act provides that the sale could be held by the Assistant Collector if he was delegated with the same authority by the Collector. We find it difficult to endorse this line of reasoning in view of the difference between the phraseology used in section 164 and section

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177 of the U. P. Land Revenue Act. Section 164 does make a provision for the power of delegation. On the other hand section 177 does not. In the absence of any such words giving the Collector any power to delegate any of his functions under section 177, we find it difficult to hold that any authority other than the Collector was empowered to issue a sale certificate. The mere act of delivery of possession might be regarded to be a ministerial act. It is however, difficult in our opinion to regard the act of issue of sale certificate and delivery of the same to the purchaser as merely a ministerial act. It is to be remembered that the sale certificate is the foundation of title. It is probably because this act was of such an important and vital nature that the legislature advisedly did not consider it proper to make any provisions for delegation for the exercise of this power. In this situation, we are of opinion that it would not be correct to hold that the power expressly vested in the Collector alone under section 177 of the U. P. Land Revenue Act could be exercised by the Tahsildar either on his own behalf or even on behalf of the Collector under an authority delegated by him. In this connection it is important to bear in mind that section 177, further provides that where such a sale certificate is issued by the Collector, the document itself need not be registered as a conveyance except as provided by section 89 of the Registration Act, 1877. It is probably because the legislature wanted that the document should be the mainspring of title of the purchaser that it did not consider registration necessary for such a document and exempted it from the provisions of the Registration Act. It is not necessary for us to go into the reasons that weighed with the legislature in enacting this provision of law. It is enough for us to observe that the section itself authorises the Collector and the Collector alone to issue such a certificate, and does not



make any provision for delegation of his power in this regard by him. The certificate in the present case was admittedly issued not by the Collector but by the Tahsildar. In these circumstances we must again hold that in this regard also there was a clear contravention of the mandatory provisions of law and the document in question does not comply with the requirements of section 177 of the U. P. Land Revenue Act.

The learned single Judge has in this connection relied on the presumption to be made under section 114 of the Indian Evidence Act. Illustration (e) of the said section is relevant in this connection. The illustration provides that a presumption may be made that "judicial and official acts have been regularly performed."

The above illustration indicates that the presumption, should relate not to the performance of the acts but to their regularity. Once the act is proved to have been performed, under the above provisions of law it is open to the Court, in the absence of evidence, to presume that formalities necessary for the regular performance of that Act were complied with. The above provision, however, does not in our opinion enable the Court to presume the performance of the official act itself. In the present case the official act that was required to be proved was the confirmation by the Commissioner. What has been proved is the official act of confirmation by the Tahsildar. The principle of presumption as laid down in the above illustration does not dispense with the proof of the actual performance of the official act. In the present case it appears to us that the party relying on the sale certificate has failed to prove that the official act of confirmation was itself performed by the Commissioner. In these circumstances no question of presumption of the regular performance of the act can arise. To put it in other words, what has been proved is the irregular performance of the official act.

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Where this is the situation, in our opinion it is difficult to invoke illustration (e) of section 114 of the Indian Evidence Act for the purpose of holding that the act itself was regularly performed. In the present case, the question to our mind is more a question of interpretation of the document than of presumption. It is for this reason that we have considered in detail the various terms and recitals of this document. After a meticulous examination of the same, we have, as indicated above, found that they irresistibly point to the conclusion that the act of confirmation was the act of an authority which was not empowered to perform the act at all.

We may now briefly refer to the case-law cited on behalf of the parties in support of their respective contentions.

On behalf of the appellants reliance was placed on *Walvekar v. Emperor* (1) In this case in dealing with illustration (e) of section 114 of the Indian Evidence Act, GHOSE, J. who delivered the main judgment observed as follows :

"This argument as I understand it, has been employed for the purpose of doing away with the necessity of proof of compliance of the preliminaries referred to above, namely information on oath and of due 'enquiry' before issue of warrant. Having regard however, to what I have already held about the validity of the warrant, section 114 illustration (e) Indian Evidence Act cannot in my opinion be relied upon in this case. The meaning of that provision is that, if an official act is proved to have been done, it will be presumed to have been regularly done".

CHOTZNER, J. concurred in the view expressed by GHOSE J.

The above observations were cited with approval in a Bench case of the Allahabad High Court, viz. *Swa-*

(1) (1926) I. L. R. 53 Cal. 718.

*deshi Cotton Mills Co., Ltd. v. State Industrial Tribunal U. P.* (1). These observations with which we express our respectful agreement, in our opinion, fully support the contention on behalf of the appellants.

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A large number of cases of other High Courts were also cited by the learned Counsel appearing on behalf of the appellants. In view of the unanimity of opinion on the above principle of law, we do not consider it necessary to refer to them.

The next case relied on by the learned Counsel for the appellants is that of *Emperor v. Sibnath Banerjee* (2). Referring to the nature of presumption under illustration (e) of section 114 of the Indian Evidence Act, the learned Judges laid down the law as follows:

"Before any such presumption can arise, it must be shown that the orders are on the face of them regular and conform to the provisions of the rule under which they purport to have been made."

In this connection the learned Judges examined the contents of the orders of detention under the Defence of India Act, which were before them for consideration. In the present case also, following the same method, we have examined the contents of the sale certificate. The learned Judges of the Federal Court seem to have gone a step further in this case, and to have held that not only the existence of the orders should be proved but that it should further be proved that the orders are on the face of them regular and proper. In the present case, in our opinion, the party relying on the sale certificate has not only failed to prove the existence of the order of confirmation, but has further failed to prove that the orders are on the face of them regular and in conformity with the provisions of law. As we have already observed above, the sale certificate makes a reference to the Civil Procedure Code which appears to

(1) A. I. R. 1956 All. 689, 695. (2) A. I. R. 1943 F. C. 75, 88.

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be an obviously erroneous reference. We have also indicated that the sale certificate purports to have been issued by the Court of the Tahsildar which was again a mistaken act. We have also referred to the fact that the sale certificate itself states that the sale was confirmed by the Court, meaning thereby the Court of the Tahsildar. It also bears the signature of the Tahsildar and the seal of his Court. These are again erroneous and mistaken acts. The possession also purports to be given by the Tahsildar. All these acts are, on the face of them, admittedly irregular and improper. It appears to us that the authority conducting the sale and carrying on all proceedings thereafter ignored altogether the provisions of the U. P. Land Revenue Act, as it was labouring under a misapprehension that the proceedings before it were governed by the ordinary law embodied in the Code of Civil Procedure and not by the U. P. Land Revenue Act. This erroneous impression having, at the very inception, crept into its mind, it was unwittingly misled into committing the subsequent irregularities and illegalities which were the natural consequences of the initial mistake made by it and which flowed necessarily from the same. The unfortunate result of it was that the acts performed by it bear on the face of them the stamp of irregularity and illegality. Therefore, in this atmosphere which bristles with irregularities and illegalities of such a serious type, there can be no question of the presumption under section 114, illustration (e) of the Indian Evidence Act being invoked for the purpose of lending support to the alleged validity of the sale certificate.

On behalf of the respondents, reliance was placed on a Full Bench case of the Madras High Court viz., *Sonachalam Pillai v. Kumarvelu Chettiar* (1). It was held in this case that in the case of mandatory provisions of the procedural law, in the absence of any evidence to the

(1) A. I. R. 1928 Mad. 77.

contrary, the Court would presume that all rules and legal forms were complied with. The learned Counsel argued that the provisions in the present case were also of a mandatory nature and related to procedural law. A presumption should accordingly be made in favour of their compliance. This argument seems to ignore the qualification made in the above observation to the effect that such a presumption can only be made, 'in the absence of any evidence to the contrary'. In the present case, as we have already indicated above, there is overwhelming evidence provided in the document itself pointing to a contrary conclusion. This ruling, therefore, does not appear to support the respondents' case.

The next case relied on by the learned Counsel for the respondents is that of *Mohammad Abdul Ghafoor Khan v. Syed Akram Hasan* (1). In this case the facts were that the plaintiff had purchased certain property privately after attachment and after a prohibitory order was served on the judgment-debtors not to sell the same. In the court auction that followed a part thereof was purchased by the defendant. In a suit by the plaintiff three years after attachment, the record of the Court not being available, it was not proved that service of notice was effected in the other modes described in Order XXI, rule 54 (2) of the Code of Civil Procedure. Under the above circumstances it was held that the Court below should have applied the presumption that the official acts were regularly performed, and that, in view of the fact that a material portion of the record was no longer in existence, the court was wrong in throwing on the defendant the burden of proving by definite evidence the due service of notice. In the present case, as we have already indicated, there is ample evidence available to show that the action of the authority was, on the face of it, irregular and improper.

(1) A.I.R. 1924 All. 747.

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There being intrinsic evidence in the document itself of such irregularities, no question of burden arises and we have not rested our decision in the present case on the question of burden on any party. The real question in the present case, as already observed, relates more to the interpretation of the document than to the application of any legal presumption to it.

The next case relied on by the learned Counsel is the Privy Council case of *Madhu Sudan Chawdhari v. Mst. Chandrabati Chowdhraïn* (1). In this case it was held that where an auction sale of several properties situated in several villages is sought to be set aside on the ground that the sale proclamations were not duly served in all the villages, and it is found that the record of the service of the proclamation was destroyed by a fire, which broke out in the Court house, the burden of disproving the *prima facie* presumption that official acts were rightly carried out rests with the persons challenging the sale. In the present case as we have already observed, the case has not turned on any question of burden of proof. The circumstances emerging from the intrinsic evidence provided by the document which is the foundation of the plaintiff's own claim, establish the fact that the official act of the authority concerned was itself incompetent and *ultra vires*.

The last case relied on by the learned Counsel for the respondents is that of *Anukul Chandra Chakravarti v. Chairman of the Dacca District Board* (2). In this case it appears that the validity of the action of the Government in taking proceedings of acquisition of property was challenged on the ground that all necessary steps for acquisition of the land and for transfer of the same to a public body were not taken. What was proved was that the Government had expressed its intention to acquire the land, that some necessary and proper steps

(1) (1917) 42 I.C. 527.

(2) A.I.R. 1928 Cal 485.

were taken in pursuance of that resolution, and years after the land was found in the possession of the public body to whom the land was said to have been transferred. In this case, it is not at all proved that the Commissioner, who in the present case was the proper authority for performing the act of confirmation, had, at any time expressed any intention to confirm the sale, nor is it proved that the Commissioner had, at any time, taken any steps towards the confirmation of the said sale. Further, even the fact that the auction purchaser who had purchased the house in question was given actual or even constructive possession over the property in dispute does not appear to have been proved in the present case. All that is before us is Ex. 9, a warrant of the delivery of possession. The possession delivered under it might be a mere formal act. In fact, it appears to be so in the present case, as even this warrant of delivery of possession does not contain a report of the nazir to the effect that possession was actually delivered in accordance with the said warrant. The auction purchaser of the property was Raja Ram Bhargava. The evidence indicates that he had filed a suit against Chunni Lal on the 26th July, 1933, for arrears of rent and ejectment. Even in that suit one of the pleas taken by Chunni Lal was that the sale held by the Tahsildar was null and void. The matter, however was not gone into, as the suit was dismissed on merits. This suit, at any rate, indicates that Raja Ram Bhargava was out of possession and his attempt to get possession from Chunni Lal had failed as long ago as 1933. These proceedings would, therefore indicate that the auction purchaser had not actually got possession up to 1933. There is no other evidence by which the possession of Raja Ram Bhargava can be proved or inferred. Raja Ram Bhargava sold the house in dispute to Behari Lal on the 21st November, 1936, that is, after about five years of his purchase. Behari Lal sold the house to

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Ram Ghulam on the 30th August, 1940, that is, about four years after his purchase. No clear evidence of a reliable type has been pointed out to us to indicate that Behari Lal, during the alleged subsistence of his title, exercised any right of possession or successfully asserted any title or ownership over this property. Exs. 11, 12 and 13 referred to by the learned Counsel for the respondent do not clearly indicate that they relate to the specific property in dispute. In any case, they are of hardly any value. Behari Lal himself sold the property to Ram Ghulam on the 30th August, 1940, and Ram Ghulam brought the present suit on the 4th May, 1943 i.e. about three years after his purchase. This was a suit for possession. This would obviously mean that Ram Ghulam also never got possession of the property. It would, therefore, appear that in the present case there is no reliable or cogent evidence of any acts of possession or of any successful assertion of title by any of the parties who successively relied on the sale certificate for their claim to the property in dispute. In the case of *Anukul Chandra Chakravarti v. Chairman of the Dacca District Board* (1) relied on by the respondents, the transferee of land which was said to have been acquired by the Government and which was a public body was found to be in possession of the property in dispute years after the date of acquisition. In the present case, the situation appears to be very different, as none of the transferees is shown to have ever got possession of the property during the long time which has elapsed from the 24th July, 1931, when the auction sale was held, up to the 4th May, 1943, when the present suit was brought. Under the above circumstances, the Calcutta case far from supporting the contention of the learned Counsel for the respondents would, in our opinion, militate against it.

No other case was cited before us.

(1) A.I.R. 1938 Cal. 485.



The defendants had taken two more pleas in the present case. The second plea related to the question whether the transfer in favour of the plaintiff was bad because it was intended to delay or defeat the claim of the creditors. The third plea was that the claim of the plaintiff was barred by limitation or adverse possession. In view of the fact that on the main point, namely on the question of the validity of the sale certificate, we have come to the conclusion that the sale certificate was altogether null and void and vested no title in the holder of the sale certificate, we did not think it necessary to call on the Counsel for the appellants to argue on the remaining two points.

For the above reasons, we are of opinion that this appeal should be allowed. We accordingly allow this appeal, set aside the judgment and decree of the learned single Judge and dismiss the plaintiffs' suit with costs throughout.

After the arguments in this case were closed and we had dictated our judgment, the learned Counsel for the respondents appeared before us and sought our permission to argue a new point. We allowed him an opportunity to do so. He invited our attention to section 233 of the U. P. Land Revenue Act, as it then stood. The relevant provisions of this section are as follows:

*"Matters excepted from cognizance of civil Courts, 233—No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters:*

\* \* \*

(l) claims to set aside a sale for arrears of revenue except on the ground of fraud under section 175;

(m) Claims connected with, or arising out of, the collection of revenue other than claims

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under section 183, or any process enforced on account of an arrears of revenue or on account of any sum which is by this or any other Act realizable as revenue."

The learned Counsel relied on clauses (l) and (m) cited above. As to clause (m), he argued that, under the said clause, claims which arise out of or on account of any sum which is realizable as revenue cannot be re-agitated by means of a suit. In this connection he relied on a case of the Allahabad High Court reported in *Chandu Mal v. Darbari Lal* (1). In this case it was held that the phraseology of section 233 (m) was very wide and would include all claims which arise out of the realization of arrears of land revenue or any sum realizable as revenue. In this view of the matter the learned Judges held that a suit in the civil court for setting aside a sale on the ground that the confirmation of the Collector was not duly obtained would be barred under the provisions of this section. We are of opinion that this case is clearly distinguishable from the present case. The present case is not a suit based on the plea that the sale held was bad on the ground of want of confirmation. On the other hand the situation here is just the reverse. The plaintiff has based his claim for possession on the ground that the sale was a good and valid sale. The plea here is thus not a weapon of attack. It is a plea in defence. In other words, the plea is not taken as a shield against the action brought by the plaintiff. Further the present suit is not a suit to set aside the sale on the ground that the sale was brought about by the fraud of any party, hence sub-clause (l) also cannot help the respondents. If we hold that the present case attracts the provisions of section 233 of the U. P. Land Revenue Act, then the suit itself would be held to be barred and the plaintiff would be out of Court *in limine*.

(1) A.I.R. 1950 All. 592.

Faced with this difficulty, the learned Counsel argued that the plea under section 233 can be taken by way of defence also. This argument does not seem to be warranted by the clear phraseology of section 233 of the U. P. Land Revenue Act. The expression used in section 233 indicates that it is the plaintiff who is barred from instituting a suit on the ground envisaged in that section. The section is not meant to cover a plea of a defensive nature at all. In this connection the learned Counsel for the respondents relied on *Ewaz Ali v. Mst. Firdous Jehan* (1). In this case it was held that the plea of section 53-A of the Transfer of Property Act can be taken by a plaintiff in a suit which is instituted under the provisions of Order XXI, rule 103 of the Code of Civil Procedure. We are of opinion that a suit instituted under Order XXI, rule 63 does not provide an analogy to the proceedings before us. It may be mentioned that the party who institutes a suit under Order XXI, rule 103 is a person who has already figured in the execution proceedings and has lost there. He is required by law to bring a suit if he wants to establish his right. The step taken by such a party is thus a compelling one and is obviously of defensive nature. Order XXI, rule 103 provides as follows:

"Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of property; but subject to the result of such suit, if any, the order shall be conclusive."

In view of this provision a suit filed by a party (which has lost its case) under Order XXI, rule 103 is of a defensive nature, since the plaintiff is compelled by law to institute it, on pain of losing his right if he does not do it within the period prescribed for the same. No such

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(1) A.I.R. 1944 Oudh 212.

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considerations can apply to the present case. Under the circumstances, we are of opinion that this ruling would have no application to the present case. There appears to be no merit in this argument also. We, therefore, see no reason to change the view that we have taken in this case.

*Appeal allowed.*

### CIVIL MISCELLANEOUS

*Before Mr. Justice Dayal and Mr. Justice Chaturvedi*

1959  
March 10,

RAM SWARUP AND OTHERS (APPLICANTS)

v.

G. D. SAHGAL AND OTHERS (OPPOSITE-PARTIES)

**Representation of the People Act, 1951, s. 117—Election petition dismissed—Remand ordered—Same Tribunal to try jurisdiction. Reference to Election Commission not necessary.**

An election petition dismissed on the ground of non-compliance with the provisions of s. 117 of the Representation of the People Act, 1951 is on remand to be tried by the same Election Tribunal if he is still available and it is not necessary that the matter be referred to the Election Commission for starting the proceedings afresh in accordance with the provisions of s. 86 of the Act. The particular individual having already been appointed by the Commission to try the election petition has jurisdiction to continue the trial and to conclude it according to law.

Civil Miscellaneous Writ No. 732 of 1959.

The facts appear in the judgment.

*Jitenāra Kumar, K. N. Tripathi and B. D. Mukerji,*  
for the applicants.

*Standing Counsel,* for the opposite-parties.

The judgment of the Court was delivered by—

DAYAL, J.:—This is a petition under Articles 226 and 227 of the Constitution praying for the issue of a writ of *quo warranto* requiring the respondent no. 1, Sri G. D. Sahgal, District and Sessions Judge of Allahabad, to show the authority under which he was trying Election Petition No. 366 of 1957 (*Brij Bhushan v. Raja Anand Brahma Shah*), for the issue of a writ of prohibition prohibiting the respondent no. 1 to proceed with the trial of the said election petition and for the issue of a writ of *certiorari* quashing the entire proceedings held before the Election Tribunal, respondent no. 1, between 4th October, 1958 and 5th March, 1959, and the Tribunal's order, dated 4th March, 1959.

The facts leading to this petition are that the present petitioners filed an election petition against Raja Anand Brahma Shah and Sobh Nath, respondents nos. 2 and 3, who had been declared elected as members of the Legislative Assembly from the 182 Robertsganj Legislative Assembly Constituency. The Election Commission of India appointed respondent no. 1 as Election Tribunal for the trial of that petition. The petition was dismissed under sub-section (3) of section 90 of the Representation of the People Act, 1951 on the ground of non-compliance with the provisions of section 117 of the Act. The petitioners then presented Civil Miscellaneous Writ No. 678 of 1958 in this Court. That writ petition was allowed on the 29th July, 1958.

The operative portion of the order is—

“We, consequently, direct that a writ shall issue quashing the order of the Tribunal, dated 19th September, 1957 by which the election petition was dismissed. The petitioners will be entitled to their costs of this petition which we fix at Rs.100. The result of our order is that the election peti-

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tion, which was wrongly dismissed by the Election Tribunal, shall be deemed to be pending and the Tribunal shall proceed to decide it in accordance with the law."

Dayal, J. Thereafter the respondent no. 1, the original Election Tribunal, took up the election petition for further proceedings on the 4th October, 1958. On the 3rd March, 1959 the petitioners applied to the Tribunal questioning its jurisdiction. The application was rejected.

The jurisdiction of the respondent no. 1 is questioned on the ground that it became *functus officio* after it had dismissed the election petition on the 19th September, 1957 and that neither the order of the High Court dated the 29th July, 1958 revived that Tribunal nor the High Court could have revived it. It is contended that the Election Commission should have started afresh in accordance with the provisions of section 86 of the Act, that is it should have republished the election petition and should have appointed afresh a Tribunal to try the election petition. We do not agree with these contentions and are of opinion that the order of the High Court dated the 29th July, 1958 did hold that the election petition, as a result of the quashing of the order of the Tribunal dated the 19th September, 1957, was pending, presumably before the Tribunal itself and that that Tribunal could proceed to decide the election petition in accordance with the law. This can be the only interpretation of the order of this Court. In the present case this Court itself had ordered it to be pending before that Tribunal and to be tried by that Tribunal in accordance with the law, and surely that order of this Court cannot be questioned before it by means of this writ petition. It is submitted for the petitioners that this Court did not really mean the peti-

tion to go back to the same Tribunal. We find it difficult to interpret the order of this Court in that way. The petition was deemed to be pending and must be deemed to be pending in the same Tribunal which had its existence on the date it pronounced the order. If no Tribunal existed, the petition was not pending anywhere, and, strictly speaking, it would have to be represented to the Election Tribunal or to the Election Commission by this Court—a course which is not suggested to be correct by learned Counsel for the petitioners.

The contention of the learned Counsel for the petitioners that after the decision of this Court dated 29th July, 1958, the election petition should again have been referred to the Election Commission and the Election Commission should have acted under section 86 of the Representation of the People Act a second time also does not appeal to us. Sub-section (1) of section 86 is only relevant for our present purposes. It is as follows:

"If the petition is not dismissed under section 85, the Election Commission shall cause a copy thereof to be published in the official *Gazette* and a copy to be served by post on each respondent, and shall then refer the petition to an Election Tribunal for trial."

A reading of sub-section (1), quoted above, would show that it does not contemplate or provide for the appointment of another Tribunal to try the same election petition which, though dismissed previously by the Tribunal had to be retried on account of those orders being set aside either by the appellate court or by the High Court in the exercise of its jurisdiction under Article 226 of the Constitution. Section 86 just provides that in case an election petition is not dismissed under section 85, the Election Commission shall cause a copy thereof to be published in the official *Gazette* and shall

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then refer the petition to an Election Tribunal for trial. The Election Tribunal is appointed for the trial of the petition and, in one sense, the trial is not concluded till the election petition is finally disposed of. It may appear to be disposed of finally by a certain order of the Tribunal, but in case that order is set aside and the election petition has to be reheard, it is difficult to say that the petition had been finally disposed of by the earlier order and its trial had come to an end. The petition, in such circumstances, will have to go back to the same Tribunal which had jurisdiction over it in the first instance. It could not have been contemplated by the Legislature that after the case has been remanded a copy of the election petition should again be published in the official *Gazette* and copies of it served a second time on the respondent. This would be an entirely futile proceeding.

If for any reason the Election Commission thinks that the Election Tribunal appointed by it cannot or should not proceed with the case, it has been granted full powers under section 89 of the Act to withdraw and transfer election petitions. Under section 89 the Election Commission has been authorised to withdraw any petition pending before the Tribunal and transfer it for trial to another Tribunal constituted in accordance with the provisions of section 86. In such a case another Tribunal may be constituted. It also may be that a District Judge appointed as Election Tribunal is transferred from one district to another and in such a case the Election Commission may constitute another Election Tribunal. But there is nothing in sections 86 and 89 to suggest that if the person appointed as the Election Tribunal is still available and the case is remanded by the High Court, the matter should again be referred to the Election Commission. The particular individual having already been appointed by the



Commission to try the election petition has jurisdiction to continue the trial and to conclude it according to law.

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For the reasons stated above, we do not accept the contention raised on behalf of the petitioners against the jurisdiction of the respondent no. 1 to try this election petition. We, therefore, dismiss this petition.

*Petition dismissed.*

### APPELLATE CIVIL

*Before Mr. Justice Beg and Mr. Justice V. D.  
Bhargava.\**

KAILASH CHANDRA (APPELLANT)

v.

1959  
March 16,

UNION OF INDIA, RAILWAY DEPARTMENT  
(RESPONDENT)

**Supreme Court—Leave to Appeal—Interpretation of Fundamental Rule 56 equivalent to Rule 2046 (2) (a) of the Indian Railway Establishment Code—Constitution of India, Article 133 (1) (c), scope of.**

Where the case involves an interpretation of Fundamental Rule 56 which is equivalent to rule 2046 (2) (a) of the Indian Railway Establishment Code to the effect that the contention of one party was that he was entitled to be retained in service up to the age of 60 years unless he was found to be inefficient, the contention of the other party is that the servant has got the right to be retained in service only up to the age of 55 years, and thereafter the State has the option to make him to retire or retain him in service up to the age of 60 years. The interpretation of this rule may affect not only the claim of the present plaintiff but also a large number of other cases which may arise under the aforesaid rule; such a case is a fit one for the grant of leave to appeal to the Supreme Court under Article 133 (1) (c) of the Constitution of India.

Supreme Court Appeal no. 67 of 1958.  
Case-law discussed.

\*Sitting at Lucknow.

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*Harish Chand and R. B. Bisaria*, for the appellant.

*B. N. Mulla*, for the respondent.

The facts appear in the judgment.

The judgment of the Court was delivered by—

BEG, J.:—This is an application made by one Kailash Chandra under Article 132 (1) and Article 133 (1) (c) of the Constitution of India. The applicant subsequently applied for an amendment to the effect that this application might also be treated as an application under Article 133 (1) (b) of the Constitution. This application was allowed and the applicant has made the necessary amendments in this regard. The applicant was employed as a ministerial railway servant in the East Indian Railway. He was working as a sub-head in the Divisional Accounts Office of the East Indian Railway at Lucknow. He was compulsorily retired from service on 30th June, 1948 on attaining the age of 55 years. Thereafter the applicant brought a suit out of which the present proceedings have arisen. In the suit he prayed for a declaration that the plaintiff's compulsory retirement on 30th June, 1948, on attaining the age of 55 years was illegal and *ultra vires* as under the railway rules he had the right to continue in service till he attained the age of 60 years. The plaintiff also claimed an amount of Rs.14,777-6 as arrears of dues payable to him. The details of this amount were given in para 5 of his plaint. They comprised his salary, dearness allowance and city allowance, which according to him, were payable to him from 1st July, 1948 to 31st July, 1952 that is, for a period of four years.

The suit came up for trial before the learned Civil Judge, Mohanlalganj, Lucknow, who decreed the suit on 30th September, 1955. Dissatisfied with the said judgment an appeal was filed in the High Court by the Union of India. This was First Appeal No. 3 of

1956. On 20th November, 1958 a Bench of this Court allowed the appeal and dismissed the plaintiff's suit. It may also be mentioned that the present applicant had also filed a cross objection in that appeal. That cross objection was also dismissed. Thereafter the plaintiff has filed the present application in this Court.

At the very outset the learned Counsel for the applicant submitted that the present application was covered by the provisions of Article 133 (1) (b) of the Constitution. He, therefore, argued that in this view of the matter he would be entitled to the certificate prayed for as a matter of right. In this connection he submitted that the present claim of the plaintiff related to an amount of Rs.14,777-6. He invited our attention to the fact that subsequently the plaintiff had filed another suit making a similar claim and that suit was decreed by the Civil Judge for an amount of Rs.5,330-10. Adding the two claims in the two suits the learned Counsel contended, that the value of the claim made by the plaintiff in the present case would exceed an amount of Rs.20,000. Having heard learned Counsel for the applicant on this aspect of the case, we find it difficult to uphold this contention. It may be mentioned in this connection that the present case of the applicant was that his compulsory retirement at the age of 55 years on 30th June, 1948 was bad in law. The plaintiff's case was that he was entitled to remain in service up to the age of 60 years. In other words, at the most the plaintiff could claim according to his present case, the emoluments accruing to him for a period of five years and no more. In para 5 of the plaint filed by the plaintiff, the plaintiff has given the details of the sum of Rs.14,777-6 which he claimed in the present case. According to the details given in para 5 mentioned above, this amount covers the entire claim of the plaintiff for a full period of four years. At the

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most, therefore, the plaintiff could only claim emoluments in a similar manner for another period of one year. One-fourth of the amount claimed by the plaintiff would come to an amount of Rs.3,694-4. Even if this amount is added to the amount claimed by the plaintiff it would appear that the figure would not exceed the sum of Rs.20,000 and would only be Rs.18,000 and odd. In this view of the matter we are of opinion that the present case cannot be covered by the provisions of Article 133 (1) (b) of the Constitution.

In the alternative, the learned Counsel for the applicant has contended that the present case is a fit one for appeal to the Supreme Court under Article 133 (c) of the Constitution. Having heard the learned Council for the applicant on this point we are of opinion that there is force in this contention. The case involves an interpretation of Fundamental Rule 56 which is equivalent to rule 2046 (2) (a) of the Indian Railway Establishment Code and which is applicable to the present case. It reads as follows:

"A ministerial servant, who is not governed by sub-clause (b), may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient, up to the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing, and with the sanction of the competent authority."

The contention of the applicant was that on a proper interpretation of the above rule he was entitled to be retained in service up to the age of 60 years, unless he was found to be inefficient. On the other hand, the contention of the Union of India was that the plaintiff had got the right to be retained in service only up to the age of 55 years and thereafter the State has the option

to make him to retire or retain him in service up to the age of 60 years. The Bench of this Court before which the appeal came up for hearing took into consideration the observations of the Court contained in three cases, namely, *Raghunath Narain Mathur v. Union of India* (1) *Krishna Dayal v. General Manager, Northern Railway, Baroda House, New Delhi* (2) and *Basanta Kumar Pal v. The Chief Electrical Engineer* (3) and took the view in favour of the Union of India. On the other hand reliance on behalf of the applicant was placed on a Supreme Court case reported in *Jai Ram v. Union of India* (4). In that case the observations made by the Supreme Court were as follows:

"We think that it is a possible view to take upon the language of this rule that a ministerial servant coming within its purview has normally the right to be retained in service till he reaches the age of 60. This is conditional undoubtedly upon his continuing to be efficient. We may assume, therefore, for purposes of this case that the plaintiff had the right to continue in service till 60 and could not be retired before that except on the ground of inefficiency."

In the above case the view of the Bench of this Court was that the Supreme Court had proceeded on an assumption that normally the employee has the right to be retained in service till he reaches the age of 60 years. The matter was not decided by the learned Judges nor did they discuss the point on merits. But, at the same time one cannot help feeling that the learned Judges of the Supreme Court in this case did contemplate the possibility of the interpretation which is put forward before us on behalf of the applicant as a reasonable one. It cannot therefore, be said that the view contended for on behalf of the applicant is a view

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(1) A.I.R. 1953 All. 352.

(3) A.I.R. 1956 Cal. 93.

(2) A.I.R. 1954 Punj. 245.

(4) A.I.R. 1954 S.C. 584.

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which cannot be taken by the Court. In other words, it cannot be said that there cannot be two views in respect to this matter.

In a full Bench case of the Madras High Court reported in *Rimmalapudi Subba Rao v. Noony Veeraju* (1) it was held as follows:

"Any question of law affecting the rights of parties substantially would not by itself be a substantial question of law. An important or difficult question would of course be a substantial question but even if a question is not important or difficult, if there is room for reasonable doubt or difference of opinion on the question then it would be a substantial question of law within the meaning of Article 133 of the Constitution of India. (vide head note)."

In the present case it is further to be noted that the trial court also took the view which would support the case of the applicant.

Further, in the present case it may also be observed that the interpretation of this Rule might affect not only the claim of the plaintiff in the other suit but also a large number of other cases which might arise under the aforesaid rule. An authoritative pronouncement by the highest court, is, therefore, necessary to clarify the position. For the above reason we are of opinion that this is a fit case for grant of the certificate prayed for. We accordingly allow this application, and declare this case to be a fit one for appeal to the Supreme Court under Article 133 (1) (c) of the Constitution of India.

In the circumstances of the case we make no orders as to costs.

*Application allowed.*

(1) A.I.R. 1951 Mad. 969.

## CIVIL REFERENCE (FULL BENCH)

Before the Hon'ble O. H. Mootham, Chief Justice, Mr.  
Justice Dayal and Mr. Justice Srivastava

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March 20.

SIDHNATH MEHROTRA, RAI SAHEB (APPLICANT)

v.

## BOARD OF REVENUE (OPPOSITE-PARTY)

**Indian Stamp Act, 1899, s. 24—Property subject to encumbrance sold free from it—Stamp duty payment of—Interpretation of Statutes—Explanation to s. 24, Indian Stamp Act—Construction of.**

By s. 24 of the Indian Stamp Act:

"Where any property is transferred to any person . . . subject either certainly or contingently to the payment . . . of any money. . . . whether being or constituting a charge or encumbrance upon the property or not, such . . . money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty.

*Explanation*—In the case of a sale of property subject to a mortgage or other encumbrance, any unpaid mortgage money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale."

Where property subject to a charge to the extent of Rs.10,00,000 was with an arrangement with the mortgagee, sold for a sum of Rs.1,00,000 free from encumbrance as the mortgagee limited his charge to Rs.5,00,000 out of which a sum of Rs.3,89,000 was paid to him and the sale consideration of Rs.1,00,000 was left with the vendee to be paid to him while the payment of the balance of Rs.11,000 was promised by the vendor.

*Held*, that the property though originally subject to a charge, the sale thereof was not subject to any encumbrance and was as such not covered by s. 24 of its Explanation. Stamp duty accordingly was payable on a sum of Rs.1,00,000 only and the amount of encumbrance could not be added to it.

*Held*, further, that the words "subject to mortgage or other encumbrance" used in the Explanation to s. 24 governs the words "sale of property" and not the word "property" itself. The explanation can only clarify the section and not enlarge its scope.

*Waman Martand Bhalerao v. Commissioner, Central Division*

(1) and *U. K. Janardhano Rao v. Secretary of State for India*

(2) relied on.

(1) (1925) I.L.R. 49 Bom. 73.

(2) (1931) I.L.R. 58 Cal. 33.

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Civil Miscellaneous Reference No. 213 of 1955 under section 57 of the Indian Stamp Act, 1899.

The facts appear in the judgment.

*H. C. Sharma*, for the applicant.

*Jagdish Swarup*, for the opposite-party.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This is a reference by the Board of Revenue under section 57 of the Indian Stamp Act, 1899.

Several persons, who were carrying on business in the name of Messrs. Munna Lall & Sons, were lessees of a plot of land situated in Qasimganj, Kanpur. On a portion of that plot they had constructed an oil mill known as Sri Govind Oil Mills. In another portion they had an ice and cold storage factory in respect of which they had taken two persons Sri Shyam Sunder Gupta and Sri Satya Prakash Gupta as their partners. The entire land as well as the constructions standing upon it were equitably mortgaged with the Chartered Bank of India, Australia and China in the year 1938. By the year 1952 a sum of over Rs.10,00,000 was due to the bank in respect of the mortgage. When the bank started insisting on the repayment of its dues the mortgagors decided to sell all their rights in the Sri Govind Oil Mills as well as in the Kanpur Ice and Cold Storage Factory in favour of Messrs. Oil Corporation of India Limited. It will be convenient to refer to the mortgagors hereafter as vendors and the Oil Corporation of India Limited as vendees. The two initial obstacles to the sale were the mortgage for over Rs.10,00,000 which stood in favour of the Chartered Bank and the fact that Messrs. Shyam Sunder Gupta and Satya Prakash Gupta were partners in the business of the Kanpur Ice and Cold Storage Factory. Messrs. Shyam Sunder Gupta and Satya Prakash Gupta, however, agreed to consent to the sale of the Ice and Cold Storage Factory provided



a sum of Rs.66,000 was paid to them. The bank also agreed to release the property from the charge it held over it provided a sum of Rs.5,00,000 was paid to it. The arrangement which was ultimately arrived at between the vendors and the vendees therefore was that the properties mentioned below should be sold to the vendees for the consideration mentioned against each of them:

(1) The plant, machinery and goodwill of the Kanpur Ice and Cold Storage Factory	Rs.
... ..	1,12,000
(2) Machinery of Sri Govind Oil Mills	3,00,000
(3) Stores of Sri Govind Oil Mills	25,000
(4) Goodwill of Sri Govind Oil Mills	18,000
(5) The vendors' rights in the buildings standing over the plot and as lessees in the land.	1,00,000
	5,55,000

Out of the amount that was to be paid by the vendees, Rs.66,000 were to be paid to Messrs. Shyam Sunder Gupta and Satya Prakash Gupta and Rs.4,89,000 were to be paid to the Chartered Bank of India, Australia and China. As the bank had agreed to release the property from its charge only on payment of Rs.5,00,000 the vendors themselves undertook to pay the balance of Rs.11,000 to it. In pursuance of this contract the vendees paid to the bank a sum of Rs.3,89,000 and agreed to pay Rs.66,000 to Messrs. Shyam Sunder Gupta and Satya Prakash Gupta for which they furnished to the said persons a guarantee of the Bank of Bikaner Limited. A sale deed of the immovable property, viz. the rights of the vendors in the buildings and the land, was thereafter executed on the 15th of December, 1952 by the vendors in favour of the vendees for an ostensible consideration of Rs.1,00,000 and a stamp duty of Rs.4,400 was paid in

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respect of it. When the deed was presented before the Sub-Registrar of Kanpur he held it to be insufficiently stamped and impounded it. He was of opinion that as the property which had been sold was subject to an encumbrance in favour of the bank in respect of Rs.10,00,000 under section 24 of the Indian Stamp Act a duty of Rs.24,000 was payable on the sale deed. He also pointed out that under section 107(1) of the Cawnpore Urban Area Development Act, 1945 a further duty of Rs.20,000 was payable in respect of the deed. He sent the document to the Collector of Kanpur for necessary action. The Collector was of the view that the real consideration of the sale was Rs.5,55,000 and stamp duty was payable on that amount only. It came on calculation to Rs.13,320. In regard to the duty payable under the Cawnpore Urban Area Development Act the Collector was of opinion that it was payable only on Rs.1,00,000 the value of the immovable property which was being transferred. He was, however, not sure about the correctness of his view and referred the whole case to the Board of Revenue under section 56(2) of the Stamp Act for decision. The Board at first accepted the view taken by the Collector that a sum of Rs.13,320 was payable as stamp duty but subsequently it was requested to revise its orders or to refer the case to this Court. The Board has therefore referred the following points for the decision of this Court:

(1) Whether the documents is a sale deed for a consideration of Rs.1,00,000 as contended by the executants.

(2) Whether in view of the provisions of section 24 of the Stamp Act, the sale consideration shall be deemed to be Rs.5,55,000 and duty liable to be paid thereon as held by the Board.

(3) Whether the consideration of the sale will be deemed to be Rs.10,00,000 i.e. the entire amount due to the mortgagee Bank, and duty is payable thereon.

(4) On what amount is the additional stamp duty under section 107 of the Cawnpore Development Act, 1945, leviable.

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The first three questions are inter-related and have therefore to be considered together. A copy of the sale deed in respect of which the stamp duty has to be assessed has been appended by the Board of Revenue to its order of reference and a perusal of it shows that after reciting in its preliminary clauses the facts which have already been narrated by us the terms and conditions of the sale were set forth in seven clauses. The first clause contains the details of the property which was being transferred and also mentions the consideration for which the sale was being made. The second clause declares that the property was being sold free from all encumbrances except the charge in favour of the bank which was to be paid off in the manner indicated in the preliminary clauses. The third clause contains an assurance about the vendors title and right to transfer and the fourth contains the covenant of quiet enjoyment. The fifth clause relates to the apportionment of liability for taxes and the lease rent. In the sixth clause the vendors undertake to have the mutation effected in favour of the vendees and in the seventh they guarantee the reimbursement of any loss which the vendees suffer on account of defective title or the discovery of any other encumbrance. At the end there is a description of the properties which were being conveyed.

It is thus clear that though in the preliminary clauses there is a recital in respect of the other properties which had also been transferred in connection with the same transaction, e.g. machinery, stores and goodwill, the deed was being executed only to effect the transfer of the immovable properties described therein. In fact, a registered sale deed was required only in respect of the immovable property that was being conveyed. The

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other properties could be transferred even without a deed. In the first term of the deed therefore the vendors described in detail what they purported to "sell, transfer and assign" to the vendees and at the end of the deed they describe the properties "hereby conveyed taken as a whole".

What is stated in the preliminary clause no. 16 and the beginning of the first term of the deed also shows that the consideration of the immovable property which was being conveyed through the sale deed was, Rs.1,00,000 only. The balance of Rs.4,55,000 which the vendees had undertaken to pay represented the consideration of the other properties which had already been transferred. The view which the Collector and the Board of Revenue appear to have taken that the entire sum of Rs.5,55,000 should be held to be the consideration of this sale deed alone appears to be manifestly incorrect because in that case the machinery, stores and goodwill of Sri Govind Oil Mills as well as the Kanpur Ice and Cold Storage Factory must be held to have been transferred *gratis*. That does not appear to have been the intention of the parties. As has been mentioned in the deed at more places than one it had been expressly agreed between the parties that the consideration which would be paid for the immovable properties in respect of which the sale deed was being executed would be Rs.1,00,000 alone.

It was, however, urged that even if it be conceded that the consideration of the sale deed was Rs.1,00,000 only the immovable properties for which that consideration was being paid was admittedly subject to an encumbrance amounting to Rs.10,00,000. In view of the provisions of section 24 of the Stamp Act and particularly the Explanation appended to it therefore the amount of the encumbrance must be taken into account

for correctly assessing the stamp duty payable in respect of the document. Three alternative suggestions were put forward in this connection :

(1) The property sold being encumbered to the extent of Rs.10,00,000 duty should be payable *ad valorem* on that amount.

(2) If it be said that the bank in whose favour the encumbrance stood had agreed to release the property from all charges on payment of Rs.5,00,000 only duty should be payable at least on the sum of Rs.5,00,000.

(3) In any case the sum of Rs.11,000 which would remain payable on account of the encumbrance and for which the vendors had undertaken the liability must be added to the ostensible consideration of Rs.1,00,000 for determining on what amount the stamp duty in respect of the sale deed was to be paid.

The portion of section 24 of the Indian Stamp Act which is material for our present purposes reads as follows :

"Where any property is transferred to any person. . . subject either certainly or contingently to the payment. . . of any money. . . whether being or constituting a charge or incumbrance upon the property or not, such . . . money or stock is to be deemed the whole part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty.

\* \* \* \*

*Explanation.*—In the case of a sale of property subject to a mortgage or other encumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale."

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It has been urged by the learned Junior Standing Counsel, who appeared on behalf of the Board of Revenue in the present reference, that the property which had been transferred through the deed in question was admittedly subject to an encumbrance of Rs.10,00,000. The sale in favour of the vendees was subject to that encumbrance. Under the main provision of section 24 therefore the amount of such an encumbrance is to be deemed to be the whole or a part of the consideration chargeable with *ad valorem* duty. He urged that the Explanation added to the section made the position quite clear.

The learned counsel for the vendors, however, pointed out that the main section did not apply to the present case at all because the sale in the present case had not been made subject to any encumbrance. The property had been sold free from all encumbrances. He urged that the Explanation could not enlarge the scope of the main section and that the Explanation too could apply only if the sale was made subject to a mortgage or other encumbrance. In any case he pointed out under the Explanation only the unpaid part of the encumbrance could be deemed to be a part of the consideration of the sale. In the present case the bank had agreed to limit the amount of its encumbrance on the property in question to Rs.5,00,000. Out of that amount Rs.3,89,000 had been paid before the sale deed was executed. The sum of Rs.1,00,000 which was the consideration of the sale deed was to go to the satisfaction of the encumbrance and as the property was being sold free from encumbrances the liability for the payment of the balance of Rs.11,000 had been taken by the vendors. The vendees were therefore going to get the properties free from all charges. That being so, there was no unpaid part of the mortgage money which could be deemed to be a part of the consideration of the sale.

The first question that therefore arises is whether section 24 as well as its Explanation apply to all cases where the property transferred is subject to an encumbrance or charge or whether they were intended to apply only to those cases in which the transfer is made subject to the charge. In other words, whether the clause in the main section "subject either certainly or contingently to the payment or transfer of any money or stock whether being or constituting a charge or encumbrance upon the property or not" is meant to apply to the word "property" or to the word "transferred" used at the beginning of the section.

Property which can be transferred may be encumbered or unencumbered. Cases of sale of unencumbered property do not present much difficulty so far as the question of stamp duty is concerned. The consideration in such cases is known and is specifically mentioned in the deed itself. For the purpose of liability to stamp duty encumbered property may be transferred either subject to the encumbrance or free from all encumbrances in the sense that the ultimate liability for the encumbrance shall not be of the transferee. If it is transferred subject to the encumbrance the transferee undertakes the liability of satisfying the encumbrance and if the encumbrance is his own its amount is set off towards the price. A transfer free from all encumbrances may take one of three different forms. The transferer may undertake the liability of satisfying the encumbrance himself and assure the transferee that the latter will have no concern with it. A part of the consideration may be left with the transferee for satisfying the encumbrance and getting the property freed from it. It is also possible that no reference to the encumbrance may be made in the deed itself and the parties may be left to seek their rights and remedies in respect of it in the usual course. To take a concrete instance,

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suppose a property is worth Rs.10,000 and is subject to an encumbrance of Rs.4,000 it may be sold for Rs.10,000 and the vendor may undertake to satisfy the encumbrance out of the amount he is receiving. The vendee in that case will have the property free from the charge and will have nothing to do with the encumbrance. The vendor may, however, take Rs.6,000 from the vendee and leave Rs.4,000 with him for satisfying the encumbrance. In that case also the property will be sold free from encumbrance. The sale may, however, be made for Rs.6,000 without any mention of the encumbrance. In that case if the vendee wants to get the full rights in the property he will have to satisfy the encumbrance himself and if the encumbrance was concealed from him may ultimately hold the vendor liable for the amount.

The purpose of section 24 appears to be to create a legal fiction so that at least for the purposes of stamp duty all transfers may stand on the same footing. If the property is sold free from the encumbrance the amount of the encumbrance is included in the price and duty is payable *ad valorem* on the price. If, however, the property is sold subject to the encumbrance the real price is the price paid plus the amount of the encumbrance. In such cases therefore section 24 provides that the amount of encumbrance will have to be added to the price in order to fix the amount on which *ad valorem* duty will have to be paid. That being the purpose of the enactment, it becomes difficult to accept the contention that in all cases of transfer of encumbered properties even if the sale is made free from encumbrances the amount of the encumbrance should be added to the price paid for the purpose of stamp duty. If that is done, the duty payable in respect of the same property will be higher in case it is encumbered than it would be if it has no charge upon it. Thus in the case already mentioned, if the property is not encumbered duty will



have to be paid on Rs.10,000 but if it is encumbered duty will have to be paid on Rs.14,000. This in our opinion could not have been the intention of the Legislature. We are therefore unable to accept the contention that section 24 or its Explanation applies to all cases where encumbered property is transferred whether transfer is made free from encumbrances or subject to them. We think it applies only in case where the property is sold free from encumbrances and the words "subject . . . not" apply to the word "transferred" and not to the word "property" as used in the section.

When the main section is applicable only to cases of transfers subject to an encumbrance the Explanation too can apply only to such cases. The Explanation could not enlarge the ambit of the section. It could only clarify its provision. The words "subject to a mortgage or other encumbrance" used in the Explanation therefore govern the words "sale of property and not the word "property" itself.

There are observations in the decisions of the Bombay High Court in *Waman Martand Bhalerao v. The Commissioner, Central Division* (1) and of the Calcutta High Court in *U. K. Janardhano Rao v. Secretary of State for India* (2) which are in accord with the view we are taking.

Before section 24 or its Explanation can therefore be applied to the transaction now before us it has to be seen whether the sale in the present case was made subject to the encumbrance in favour of the Chartered Bank or free from it. It is common ground that there was no other encumbrance on the property. If the sale was made free from the encumbrance the section or the Explanation will not apply at all. The amount of the encumbrance can be added to the price for the purposes

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(1) (1925) I. L. R. 49 Bom. 73. (2) (1931) I.L.R. 58 Cal. 33.

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of stamp duty only if the sale was made subject to the encumbrance. This property along with some other properties was subject to a charge of the bank to the extent of Rs.10,00,000. The bank, however, agreed to limit the charge so far as this property was concerned to Rs.5,00,000 only and was persuaded to release the property from the entire charge provided the sum of Rs.5,00,000 was paid to it. This is mentioned in the seventeenth preliminary clause of the sale deed. Arrangement was made for the payment of that amount to the bank because the vendees wanted to have the property free from the charge. A sum of Rs.3,89,000 was actually paid to the bank before the sale deed was executed and that part of the charge was therefore satisfied (vide preliminary clause no. 18) and only Rs.1,11,000 remained to be paid to the bank. The arrangement for the payment of that amount was that the sum of Rs.1,00,000 which was the consideration of the sale in question was left with the vendee for payment to the bank (vide term no. 1 of the sale deed) and the vendors undertook to pay the balance of Rs.11,000 themselves (vide preliminary clause no. 17). It was, therefore, expressly stated in the second term of the sale deed that the property was being conveyed free from all encumbrances except the charge in favour of the bank for the satisfaction of which arrangement had already been made. There can therefore be no doubt that in the present case the property was being sold free from the only encumbrance that was there on it and not subject to it. That being so, if the consideration which was being paid was Rs.1,00,000 only (as has already been shown) stamp duty was payable on that amount only and the amount of the encumbrance whether it be considered to have been Rs.10,00,000 or Rs.5,00,000 only could not be added to the sum of Rs.1,00,000 for the purpose of calculating the stamp duty. That addition could be made only if the property was being sold subject to the

encumbrance. It is in our opinion not possible for the State to take the aid of section 24 or its Explanation to support the contention that the amount of the encumbrance should be treated as a part of the consideration of the sale.

It is, however, said that in any case even if it be conceded that out of the encumbrance of Rs.5,00,000, Rs.3,89,000 had been paid prior to the sale deed and Rs.1,00,000 was being left with the vendees for payment to the bank the balance of Rs.11,000 remained and the property must therefore be held to have been sold subject to the encumbrance at least to the extent of Rs.11,000. This sum of Rs.11,000 should therefore, it is contended, be added to Rs.1,00,000 and duty should be held to be payable on the total amount of Rs.1,11,000. Reliance is placed in this connection on the Explanation of section 24 and it is pointed out that Rs.11,000 was the unpaid money charge subject to which the sale was being made.

It is true that till the date of sale the sum of Rs.11,000 had not been paid and there was a charge on the property in respect of that amount. The vendors themselves had, however, taken liability for that amount and had agreed to pay it. It had been expressly provided in the sale deed that the property was being sold free from the charge. The vendees were in no way liable for the amount and had not undertaken to pay it. In these circumstances the property cannot be said to have been sold subject to the charge of Rs.11,000 and if it was not being sold subject to that charge the Explanation to section 24 becomes inapplicable.

Sri Jagadish Swarup, learned counsel for the vendees relied in this connection on the case of *Waman Martand Bhalerao* (1) and stressed that in that case it had been held that the Explanation could only cover cases where the purchaser had undertaken to pay the encumbrance.

(1) (1925) I.L.R. 49 Bom. 73.

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As the vendees in the present case had not given any such undertaking the Explanation to section 24 did not apply to them. The interpretation put by the Bombay Court on the Explanation did not find favour with the Full Bench of the Calcutta High Court in the case of *U. K. Janardhano Rao* (1). The view taken there was that the Explanation applied if the sale was made subject to mortgage irrespective of the question whether the undertaking to satisfy the mortgage had been taken by the vendees or not. We do not feel called upon to resolve the conflict because whatever may be the correct interpretation of the Explanation it is obvious that it cannot apply if the sale is not made subject to the encumbrance but is made free from it. In the present case in our view the sale was not made subject to the encumbrance the vendees were therefore not bound to pay stamp duty on the sum of Rs.11,000 in addition to the sum of Rs.1,00,000 on which the stamp duty was paid by them.

Our answer to the first three questions referred to us by the Board of Revenue therefore is that the document in question is a sale deed for a consideration of Rs.1,00,000 only and that the stamp duty payable in respect of it was to be calculated on that amount and not on any higher amount.

Under section 107 of the Cawnpore Urban Area Development Act, 1945 (Act No. VI of 1945) the duty imposed by the Indian Stamp Act has to be increased in the present case by two per cent of the value of the property transferred. In the present case the value of the property transferred being Rs.1,00,000 the increased duty payable was Rs.2,000 only. That is our answer to the fourth question referred to us.

The vendees are in our opinion entitled to the costs of this reference which we assess at Rs.200.

*Reference answered accordingly.*

(1) (1931) I.L.R. 58 Cal. 33.

## CIVIL MISCELLANEOUS

Before Mr. Justice Dayal and Mr. Justice Tandon

BHAGELU AND OTHERS (APPLICANTS)

v.

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**Government servants**—Formation of union of, without prior sanction of Government—Legality of such Union and consequences of its organization and membership—Government Servant Conduct Rules, 1926, rule 5-B—Manual of Government Orders, 1954, paras 95, 96 and 97—Constitution of India, Arts. 19(1), (c), (g) and (19) (6).

There is nothing in the Manual of Government Orders or the Government Servant Conduct Rules—at any rate as it remained till November 1, 1957—to prohibit or disable Government servants from forming their union or association without the prior sanction of the Government or from becoming members or office-holders of the same. Para 96 of the aforesaid Manual in fact affirms the right of association or union guaranteed by Art. 19 (1) (c) of the Constitution subject to the only condition that it is not for an unlawful purpose and para 97 in no way transgresses or limits the same.

*Ram Krishnaiah v. President District Board* (1), *Basheshar Nath v. Income Tax Commissioner* (2) and *Bala Krishna v. Assistant Secretary, Government of Bengal* (3) referred to.

**Alternative remedy**—Existence and failure to avail of—Effect, on power to grant extraordinary relief—Constitution of India, Art. 226.

Ordinarily the High Court will decline to lend its extraordinary power under Art. 226 of the Constitution in any case where an alternative remedy existed but has not been pursued but that is a rule of self discipline and in appropriate cases the Court will extend its existence in spite of such a defect in the case.

*Quaere*—(i) Whether para 97 of the Manual of Government Orders to the effect that a representative approach by Government servants to higher authorities through their recognized association alone comes within the permissible restriction on the right to practise any profession or carry on any occupation under clauses 6 and (1) (g) of Art. 19 of the Constitution.

(1) A.I.R. 1952 Mad. 253.

(2) A.I.R. 1959 S.C. 149.

(3) (1956-57) 61 C.W.N. 459.

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(ii) Whether rule 5-B of the Government Servant Conduct Rules introduced through the notification dated November 1, 1957 transgresses the fundamental right of union and association guaranteed by Art. 19 (1) (c) of the Constitution.

Civil Miscellaneous Writ No. 1076 of 1955.

S. N. Misra, for the applicants.

The Standing Counsel for the opposite parties.

The judgment of the Court was delivered by—

TANDON, J.:—There are three petitioners, who are Bhagelu, Rattu Mali and Ram Khelawan Mali, the first named was a chaukidar and the last a gardener in women's Hospital Jaunpur. The second was also a gardner but in the District Hospital, Jaunpur. Both the hospitals are Government institutions under the charge of the Civil Surgeon, Jaunpur.

All the three applicants were permanent employees under the subordinate services of the Government of this State. Besides the petitioners there were a number of other class IV servants attached to the institutions. These employees formed an association consisting of them with Ram Khelawan as President, Rattu as Secretary and Bhagelu as Treasurer and also applied for its registration under the Trade Unions Act, No. XVI of 1926. The registration was granted on 25th May, 1955. The petitioners' allegation is that the above action on the part of the class IV employees of the two hospitals was disapproved by the medical officers in-charge of those institutions, consequently they started presenting all sorts of obstacles, including threats to the members to discontinue the union. The insinuation is that the aforesaid adverse attitude of the authorities was due to the resentment which these class IV employees showed by their refusing to give *begar* to the medical officers. Hence they served 24 out of the 25

members of the union with a charge-sheet under the signatures of the Civil Surgeon as follows:

'It has come to my notice that you have organized a hospital *sangh* in association with members of Political Parties and have tried to produce obstacles in the hospital administration. Not only this but you have also been leaking out information of hospital work and administration to the members of the Political Parties. All this you have been doing even on my explaining to you that your action is against Government Servants Conduct Rules and that you cannot organize an union without prior sanction of the Government. You are therefore charged as follows:

(1) Disobedience of orders. (2) Misconduct  
Evidence which it is proposed to consider in support of the charge—

(1) Non-compliance of instructions explained to you by me.

(2) Your written statement etc. before me.

You are hereby required within ten days of the receipt of this charge-sheet to put in a written statement of your defence in reply to each of the charges. You are warned that if no such statement is received from you by me within the time allowed, it will be presumed that you have none to furnish and orders will be passed in your case accordingly.

You are further required simultaneously to inform me in writing whether you desire to be heard in person and in case you wish to examine or cross-examine any witness together to submit along with your written statement their names and addresses together with a brief indication of the evidence which each such witness shall be expected to give."

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It was clear from the above charge-sheet issued that one of the grievances against the petitioners was that they had organized a union, without prior sanction of the Government, in association with members of political parties. The reply filed by the petitioners on the above charge-sheet disputed that they had organized the union with any intention to obstruct the smooth working of the hospitals or that it had connection with any political party; on the contrary it was claimed that they had a right under the law to form the union, the object of which was to improve their social and economic condition and to advance the interests of the hospital administration. They also denied that they had disobeyed any order or command from the superior officers. A few days later on 26th May, 1955, the Civil Surgeon made an order suspending the three petitioners along with one other employee Seesh Ram as he considered that the reply furnished by them was not satisfactory. Rattu petitioner was on leave at that time, but in view of the suspension order his leave was cancelled. Thereafter the Civil Surgeon heard and examined the petitioners on the charge-sheets handed over to the petitioners—Ram Khelawan was examined on the 4th June, Bhagelu on 6th June and Rattu on 13th June—and in the end came to the conclusion that the charge of misconduct and disobedience had been proved against them. They were then asked to show cause why they should not be dismissed from service and in the end he made an order dismissing them from service. The petitioners then filed this petition impugning the said order of dismissal. Admittedly they filed no appeal against their dismissal to the Director of Medical and Health Services, which, under the rules governing their employments was open to them. One of the questions which therefore will arise in this case is whether the petition should be rejected on this ground alone. It will be dealt with later.



The main grievance against the petitioners had been that they had organized a new union which was contrary to the rules framed by the Government in that behalf as such they were guilty of misconduct. In the charge-sheet that was handed over to them they were also accused of disobedience of orders, but curiously enough no instance was cited in it, except making a vague allegation to the effect "disobedience of orders". Even at the place where the charge mentioned the evidence, which it was proposed to consider in support, no mention was made of any particular incident relating to disobedience of an order. The evidence referred to in the charge was (1) "non compliance of instructions explained to you by me" and (2) "your written statement etc. before me." The reference under item (1) to instructions was clear from the averments in paras 4(e), 4(f) and 4(g) to the instructions regarding formation of association by Government servants contained in para 97 of the Manual of Government Orders, 1954 Edition. What appeared from the Civil Surgeon's affidavit was that after these employees had formed the union it was felt that this was not a very proper act on their part. It also happened that one Sri Basit Ali, claiming to be the President of the Union, approached the Civil Surgeon on 22nd March, 1955, with certain demands or suggestions on behalf of the members of the union. The Civil Surgeon who did not like this sort of interference with the hospital administration, assembled the staff of the hospital including the petitioners and explained to them their rights and duties as Government servants *vis-a-vis* this question. At this meeting the implication of Government Servants' Conduct Rules 17 to 23 were explained. The relevant point in these rules was, firstly, that a Government servant shall not unless so authorized by the Government communicate any information contained in any document etc. to the press and others, and, secondly, that he

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shall not take part in any political movement or other activity, which directly or indirectly, may embarrass the Government. Another point that was explained by the Civil Surgeon in this meeting was with regard to the right of a Government servant to form an association.

Reading the two items relating to the proposed evidence in the charge-sheet against the petitioners in the light of the above instructions thus claimed to have been given by the Civil Surgeon, it was clear that the insistence in the charge-sheet once again was on the fact that these Government servants had organized a union though the implication also was that certain information relating to the hospital's affairs had been communicated by them to outsiders. In view, however, of the fact that neither in the charge-sheet, nor in the instructions said to have been given by the Civil Surgeon and to be found in paras 4 (e) and 4(f) aforeaid any particular instance in that behalf was mentioned, this part of the accusation if any against the petitioners remained as vague as ever. From the written statements also, which are referred to as item (2) of the proposed evidence in the charge-sheet, it was not possible to read any instance in which any information concerning hospital's affairs might be said to have been communicated by them to outsiders.

It might also be mentioned that even at the hearing of this petition, though we asked the learned Standing Counsel, he was unable to refer us to any instance imputing any such conduct to the petitioners. He was satisfied by inviting our attention to the fact alone that the petitioners having deputed Sri Basit Ali to urge their grievances concerning hours of work etc. before the Civil Surgeon they to that extent at least divulged the information to an outsider. But for successfully

founding a charge on that account it must first be established that those grievances could at all be called information for which para 17 and others of the Government Servants Conduct Rules made provision. The petitioners were resenting employment, whether on duty or otherwise beyond certain hours and Sri Basit Ali approached the Civil Surgeon to plead their above grievance before him. While therefore it may be said to be a matter concerning the employment of these Government servants, it was not possible to accept that it amounted to communication of any information contained in any document, etc. relating to hospital administration, to which class of information rules 17 and others applied.

Thus both factually and otherwise, the charge-sheet served upon the petitioners was substantially this, namely, that they had organized a union without prior sanction of the Government. Both the charges, that is, disobedience of orders and misconduct mentioned in it were directed to the same point. In any case, since it failed to cite any instances in which disobedience otherwise than by forming the union might have been indulged or some information divulged, it has to be held and construed to that effect alone.

Just here it may be worthwhile to refer briefly the statements, which the Civil Surgeon recorded, of these persons at the enquiry on the charge-sheets. Primarily these statements relate to the same matter, namely, that they had organized a union, but incidentally the petitioners were also questioned about one or two instances in which they had refused to accept some paper or were alleged to be discourteous to superior officers. As, however, no such instance was even included in the charge-sheet, nor even in the evidence or circumstances proposed to be relied upon in support, it will be not proper to attach any significance to them. In fact they are apt

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to cloud the real point which, as earlier stated, in the case of the petitioners was that they had actively worked in forming the union which was the charge against them.

It was considered necessary to refer to the above facts in order to make it clear that truly and precisely the case against the petitioners was that they had organized a union which was contrary to rules and that they thereby exposed themselves to the charge of misconduct. They were actually tried on this charge and dismissed also on that ground. This feature of the case will have to be kept in view in considering the validity of the dismissal order passed against them.

Para 96 of the Manual of Government Orders is that:

"Government servants are not prohibited from joining any society, which is not an unlawful society; but departmental notice will be taken of the conduct of any official who takes part in advocating or organizing a society which sets one class of the community against another, or in propagating the tenets of such a society."

The next para requires that the prior sanction of Government is necessary to the formation of associations by Government servants, all of whom are not workmen within the meaning of section 2(g) of the Indian Trade Unions Act (XVI of 1926). The rules governing recognition of such associations are reproduced in Appendix 5. The remaining sub-paras provide what matters shall be looked into while considering the question of recognition of such association including the qualifications required for office bearers. The purpose of the instructions regarding recognition contained in Appendix 5, as appeared from instruction no. 4, is that ordinarily the Government will not object to persons, who are not in the active service of Government, being office

holders of the association, but it has the right in individual case to refuse recognition where all the office-bearers are not either in the active service of the Government or retired officers. Instruction 5 deals with representation made from such associations and provides that notwithstanding anything contained in the rules relating to submission of petitions, etc. by Government servants, Government officers may receive representations by such associations if they are representations in connection with a matter raising a question of common interest to the class represented by the association. Instruction 6, which is rather specific, says that recognition is accorded for the purpose of enabling the employees of the Government to communicate their needs to Government or Government officers and it can be withdrawn if the association adopts other methods of ventilating those needs.

One of the questions which the parties canvassed in connection with the above provisions in paras. 96 and 97 of the instructions in Appendix 5 was with regard to their true nature and constitutional status. On behalf of the State the claim is that they are conditions of service' within the meaning of that expression contained in Article 309 of the Constitution as such any disregard of them exposes the Government servant concerned to a charge of contravention and therefore misconduct also. The class of Government servants concerned have formed an association without the prior sanction of the Government, as admittedly was the position in the present case, they have rendered themselves guilty of misconduct.

The above claim by the State is disputed by the petitioners according to whom the above provisions are no more than mere administrative instructions but do not form part of the Government Servants Conduct Rules

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as such. They further contend that their contravention cannot result in a charge of misconduct. Alternatively, the contention also is that these provisions do not prohibit Government servants from forming an association but make provision for contingencies in which alone an association formed by them will be recognized by Government and be, as such, entitled to speak collectively on behalf of the members of the service. In other words the absence of recognition has no greater effect than disentitling the association to speak on behalf of or represent the servants or entitling the Government and its officers not to attend to them.

Conditions of service of persons serving in connection with affairs of a State have under Article 309 of the Constitution to be provided by an Act of the legislature but until such an Act is enacted the Governor has been armed with the power to do so by rules. In pursuance of that power the Government has framed the Government Servants Conduct Rules to which reference has been made in para. 95 (1) also of the Manual of Government Orders. This sub-para. is:

"Rules for the conduct of Government servants have been issued separately. A copy of these rules should be so kept in each office as to be easily available for reference by all concerned."

This sub-para. exists in the same chapter as paras. 96 and 97 which are headed by the description "Government Servants' Conduct Rules and Subsidiary Instructions." Reading this heading along with the contents of sub-para. (1) of para. 95 aforesaid, it is fairly clear that the contents of paras. 95, 96 and 97 and of those that follow them are not the Government Servants' Conduct Rules or their part as such but are subsidiary instructions. As instructions they are and have to be administrative directions. They do not for the fact alone,

that they happen to concern certain aspects relating to services under the State become conditions of service of servants concerned. A condition of service is some limitation or restriction or other similar obligation connected with the employment of a person, in this case the Government servants viewed from that angle also the provision in para. 97 cannot be said, except by stretching the meaning too far, to be any limitation, restriction or obligation. As a matter of fact, it is in the nature of an administrative order which allows the Government servants to make collectively approach in certain cases those concerning the general interest of the service. Neither the para. itself nor the further instructions contained in Appendix 5 appear to go farther.

The learned Standing Counsel was unable to point out to us that these instructions had in fact been made under the rule making power in Art. 309 or any similar provision in any predecessor Constitution. On the other hand, the petitioners placed before us a copy of the Government Servants Conduct Rules to which reference existed in the counter affidavit filed by the Civil Surgeon also. In these rules which apparently were made under Art. 309 of the Constitution no provision on the lines of para. 97 of the Manual of Government Orders has existed. The present petition was commenced in 1955. The dismissal order complained of too was made in the same year. For the first time in November 1957 by a notification no. 3330/II-B—152-57 dated November 1, 1957 a new rule as 5-B as follows was added:

“Joining of Associations by Government servants  
—No Government servant shall join or continue to be a member of any service Association of Government servants—

(a) which has not, within a period of one month from its formation, obtained the recog-

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dition of the Government under the rules prescribed in that behalf, or

(b) recognition in respect of which has been refused or withdrawn by the Government under the said rules.

Prior to this there did not exist any prohibition against Government servants joining an association which had not received recognition. Two things at once followed from the amendment, firstly that prior to November 1, 1957 a Government servant unless he was otherwise disentitled to do so, was not prohibited from joining an association not recognized by Government, and, secondly, that the case of the petitioners was not affected by the above amendment which created the disability much later. It would also be deduced from it that in the absence of any other provision stopping them from becoming members of such an association they were free to do so.

In para. 96 of the Manual of Government Orders it was noticed that a Government servant was not prohibited from joining any society which was not an unlawful society. In other words it accorded freedom to a Government servant to join an association provided it was not an unlawful society. It is nowhere provided that an association which has not received the prior sanction of the Government is an unlawful society. A Government servant was thus free to join an association if it could not be identified as an 'unlawful society', even though it had not been formed with the prior sanction of the Government. The by-laws relating to the union, of which the petitioners are members or office-bearers, do not show that the union was such a society. Its object including amongst others was the advancement of efficient working of the hospital and ameliorating the economic conditions, etc. of the employees.



The membership of this association was, therefore, permitted in view of para. 96 above.

It was contended on behalf of the State that para. 97 was in the nature of a proviso to the main provision which is in para. 96, therefore, the former restricted the general permission given in para. 96 and thus imposed an obligation on a Government servant not to be a member of an association of Government servants which was not formed with prior sanction. We have considered this part of his argument but are unable to hold that para. 97 is in the nature of a proviso. This para. has simply provided the manner and the consequences of recognition of an association of Government servants, and when read with the instructions in Appendix 5 the effect of recognition. It has nothing to do with the right of a Government servant to become or not to become a member of such an association. That right is governed by para. 96. The object and purpose of para. 97 is the recognition of the association with consequent rights, etc. In this view of para. 97 it is not possible to claim that it places any restriction on the right of association which right has apparently been conceded to Government servants under para. 96. We are unable to agree with the contention also of the petitioners' counsel that by thus placing a restriction on the right of association of Government servants as such—it was exposed to the risk of Art. 19(1) (e) of the Constitution. The correct view about it in our opinion is that it does not restrict their right of association but only says what fate or value shall attach to any representation, etc. made by it. So far as the right to form an association claimed to belong to him under sub-clause (c) of clause (1) of Art. 19 of the Constitution is concerned, it has not been restricted, in fact is already assured to him under para. 96. The net and indeed the true effect of para. 97 thus is that unless the association has been formed

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with the prior sanction of the Government the association will not have the right to speak or be heard on behalf of the members of the service. Their right of association has remained unaffected, at worst the right to speak through association has been regulated which, however, is not the ground of attack by the petitioners. It will thus not be correct to contend that this para. has placed restriction on the right of association.

If this is the correct view about para. 97 the contention that it offended Art. 19(1) (c) of the Constitution has to fail. It will not be necessary in the above situation to examine whether its provisions stood the test of clause (4) of Art. 19 which authorised the placing of reasonable restrictions on the right of association in the interest of public order or morality.

In this connection it may be worthwhile to notice that one view about para. 97 can be that, since it requires Government servants to act in a certain manner in relation to their employment, namely, that a representative approach by them to higher authorities shall be made through a recognised association only, it is a matter which directly concerned clause (6) of Art. 19 which authorized the imposing of reasonable restrictions in the interest of general public on the right guaranteed to citizens under sub-clause (g) of clause (1) of that Art., namely, to practise any profession or to carry on any occupation, trade or business. If that be true it is a restriction on the right to carry on any occupation—a view that has been urged before us—the test for judging its validity will need to be found in clause (6) aforesaid. However, it does not appear necessary to express further on this question which, in our opinion, does not directly arise in the present case, particularly because para. 97 as already held, does not restrict the right of association and that alone was objected to in its case.

We shall not, therefore, embark upon a consideration of this question which will not affect the decision.

Our finding accordingly is that para. 97 places no restriction on the freedom of association. In the above context the question about its unconstitutionality on the ground that it contravened the guarantee given to a citizen by Art. 19(1) (c) of the Constitution should not really arise. However, it will be desirable to refer to three decisions which were cited at the Bar.

The one was *Ramakrishnaiah v. President District Board* (1). In this case the question arose as to the validity of certain rules framed by the Government of Madras in connection with the right of teachers of elementary schools to organise an association, etc, by them. The material portion of the rule was that the teachers will obtain the permission of the Board before forming unions for which they should apply to the Director of Public Instructions for its recognition. It further provided that the teachers in recognized elementary schools were prohibited from becoming members of unions not constituted in accordance with the rules. There was thus a dual provision: (1) that an association formed by the teachers must be recognized and (2) that no teacher could be member of any association which was not recognized.

The validity of these rules was challenged on the ground that they contravened the right of association conferred by sub-clause (c) of clause (1) of Art. 19 of the Constitution and the contention was that they prevented the teachers from becoming members of an union not recognized save at the risk of suffering consequences by way of being dealt with for misconduct. It was urged that this amounted to an unreasonable restriction

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on the freedom of association. The learned Judge held the rule to be *ultra vires* and observed as under :

“The question is whether any employee of the State or a local body could be prevented from becoming a member of an association which is not recognized by the Government, whether the previous permission or approval of the Government could be made a condition precedent for the exercise of the employee’s right to become a member of an association.”

A little further they again observed :

“Can the Government prohibit an employee from becoming a member of any association other than the recognized association?”

In connection with the other rules the State Government issued an order also pointed out that the Director of Public Instructions was not only empowered to accord sanction to the functioning of the unions but was also authorized to forbid the existence of, and dissolve, any teachers’ union not conforming to these rules. In holding the rule to be *ultra vires* the learned Judges pointed out that :

“In so far as they empowered the Director of Public Instructions to forbid the existence of, and dissolve any teachers’ union not conforming to the rules and compelling teachers in Local Board or Municipal Board to obtain the permission of the Board or Council concerned before forming union and in so far as they prohibit teachers in recognized elementary schools from becoming members of teachers unions or other teachers’ organization not constituted in accordance with the orders of the Government should be declared to be void as consisting an abridgment on the right of freedom of

association guaranteed under Art. 19(1)(c) of the Constitution."

The facts of the above case were materially different than here. Para. 97 does not prohibit the formation of unions, by Government servants, a right which has been conceded to them under para. 96. There is no right belonging to the Government or any other authority either under para. 97 to dissolve any union. No prohibition either on the lines contained in the Madras rules is present in it against Government servants joining any such association. In 1957 no doubt certain new rules have been added in that behalf in the Government Servants' Conduct Rules but we are not concerned with them here since they were not existent at the time when the impugned order was made or this petition was filed. The main consideration in the above case which weighed with the Court deciding the unconstitutionality of the rules was the prohibition directly contained against teachers joining those associations and the power further belonging to the Director of Public Instruction to dissolve any such association. In the case before us the right of association is not interfered with, on the other hand is assured by para. 96, while para. 97 itself prescribes the procedure, etc. alone for recognition. We do not, therefore, consider that the petitioners can benefit by the above decision.

The second case to which we would like to refer is *Bata Krishna v. Assistant Secretary Government of Bengal* (1). This case was cited on behalf of the State, firstly, in support of the contention that the provision in para. 97 was *intra vires* and, secondly, in support of the proposition that the petitioners having entered in Government service were not entitled to agitate the question of their *vires*. In this case two particulars rules were attacked on the ground that they infringed

(1) (1956-57) 61 C.W.N. 459.

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the fundamental right guaranteed under sub-clause (a) of clause (1) of Art. 19, that is, the right of freedom of expression. These rules prohibit the Government servants from criticising the Government and publishing information relating to foreign countries and taking part in any election etc. In the course of discussion the learned Judges relied upon an earlier decision in *Mohd. Sarafatulla Sarkar v. Suryya Kumar* (1) and quoted with approval as under:

“The Government Servants’ Conduct Rules are only rules of internal discipline operating within the spheres of Government service and limited in their operation to that spheres.

They specify certain acts which can be done by Government servants only in a certain way and other acts which may not be done by them at all, consistently with the conduct they are required to maintain as Government servants. Further the Rules cannot and do not go. They cannot and do not create a legal disability in Government servants to do effectively the “acts forbidden by the Rules, if they are otherwise competent to do them, whatever the consequences of transgression in this regard may be to their career as Government servants. While, therefore, a Government servant offering himself for election to one of the bodies mentioned in Rule 23 may bring upon himself disciplinary action which may go as far as dismissal, the consequence cannot also be that his election will be invalid or that the validity of his election will be affected by the breach. The disqualification imposed by rule 23 is of the nature of a personal bar which can be overstepped only at the Government servant’s peril, as regards his membership of a service under the Government.”

Later the learned Judges observed that there is no fundamental right of a person to obtain employment

(1) (1954-55) 59 C.W.N. 652.

under the Government. The moment he enters in Government service he becomes bound by the conditions and rules of service which regulate such employment. It is against this background that the reasonableness of the restrictions imposed by rules 20 and 23 have to be decided.

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The State contended that the petitioners having entered service of the Government could not raise the objection that para. 97 imposed any disability on them. By entering Government service they bound themselves by that provision which was at the most in the nature of a condition of service. In the words of the learned counsel for the State the petitioners have by their conduct taken upon themselves the particular obligation in other words, have waived also their right to challenge its validity.

We would also refer to the recent decision of the Supreme Court in *Basheshar Nath v. I. T. Commissioner* (1) on the question whether and how far a person can waive his fundamental right guaranteed to him under Part II of the Constitution. It, however, seems to us that these questions were not necessary for the decision of the instant case because para. 97, as held by us, does not place any restriction on the freedom of the association. Any question of waiver or of its validity otherwise should not arise.

The next question to be considered is about the validity of the dismissal orders in the case of the petitioners. The charges which resulted in their dismissal were mentioned earlier. Essentially these were that petitioners by learning themselves as members or office-bearers of the union which had not been formed with the prior sanction of the Government committed a contravention of para. 97, therefore, were guilty of misconduct. The charge of disobedience which has been included

(1) A.I.R. 1959 S.C. 149.

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in the charge-sheets was to the same purpose. And though certain other instances in which the petitioners were blamed to have behaved disobediently or insolently towards the superiors were put to them during their examination in the course of the enquiry, no such instances were cited in the charge-sheet or in the evidence relied upon in support of the charges. These other instances, therefore, cannot and in fact did not form the basis of the dismissal order passed against them. The consideration in judging the validity of the dismissal order shall, therefore, have to be confined to the charges with which they were actually charged. These were, as once before too mentioned, that they had lent themselves as members and office bearers of the union which had been formed without prior sanction.

The question that at once arises is how far they could on that account be held to be guilty of misconduct. There was no prohibition then in the Government Servants' Conduct Rules or even in para 97 prohibiting Government servants from becoming members of any such association. Still more no provision also existed attaching any disability on any Government servant on account of membership of any such association. On the contrary para. 96 gave them the freedom to join any society which was not unlawful. It is not conceivable once the above facts are there how the petitioners could be held to be guilty of misconduct by being member of the association which on account of the fact that it was not formed with the prior sanction of the Government lacked recognition. The only result of absence of sanction was that the association could not represent to the authorities on behalf of the members of the service and the Government officers were entitled to decline to hear its representations. We are, however, not concerned with that fact but with what we are concerned is that the petitioners were not in any manner



prohibited from being members of any such association or forming it. In the above circumstances the order holding them guilty of misconduct was manifestly wrong and due to a patent error. It is, therefore, liable to be quashed.

The only other point that still remained to be answered is whether this petition should be rejected on the ground that the petitioners failed to avail the right of appeal to the Director of Medical and Health Services which they had against the order of dismissal. It is true that no appeal was filed by them against the order of dismissal to the Director of Medical and Health Services instead they approached this Court directly. Ordinarily this court will decline to lend its extraordinary powers under Article 226 in any case where an alternative remedy existed but has not been pursued but this is a rule of self-discipline and in appropriate cases the court will notwithstanding the existence of any alternative remedy extend its assistance.

In the present case these are some of the circumstances which, in our opinion, cannot be ignored. The controversy throughout centred round the *sines* of para. 97 and the consequential matter whether a non-compliance of that para. was a misconduct entitling a Government servant to action against him. It is on this basis that this petition too has been fought throughout: once when it came up for hearing before a learned Single Judge who referred it to a Division Bench the same question was raised and he referred it to a Division Bench as the question was considered to be, of course by the parties including the State Government also of importance and far reaching consequence. The matter while it was still agitating the authorities of the two hospitals and before this petition was filed had been referred by the former to the Director of Medical and Health Services also seeking his instructions and as fur-

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ther appeared the Director endorsed to this extent at least that any employee who did not co-operate in the hospital's administration should be seriously dealt with. A colour had also been lent to the controversy by the fact that members of certain political parties were guiding the employees. In view of these facts we are of the opinion that it is not a fit case in which we should decline to grant the relief to which the petitioners are entitled on the ground of alternative remedy.

The result of the foregoing discussion, therefore, is that the order of the Civil Surgeon dismissing the petitioners is quashed. The petitioners have also asked a direction against the respondents restraining them from stopping the petitioners to form the union. In view of the fact that the union is already existing and further that the Government Servant's Conduct Rules have since undergone a change according to which a Government servant cannot be a member of a union not formed with the sanction of the Government and the effect of those rules has not been considered in this case we refrain from issuing any such direction. The petitioners will get their costs from the respondents.

*Application allowed in part.*

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## CIVIL MISCELLANEOUS

Before Mr. Justice Chaturvedi and Mr. Justice V. D.  
Bhargava

SURAJ BALI AND ANOTHER (APPLICANTS)

v.

BOARD OF REVENUE AND OTHERS  
(OPPOSITE-PARTIES)

Succession or transfer of land in a village—Obligation to report  
the same to the Panchayati Adalat concerned—Scope of—  
United Provinces Land Revenue Act, 1901, ss. 34 (1) and  
34 (5).

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Section 34(1) of the United Provinces Land Revenue Act as amended by the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 imposing a duty on the successor or transferee of land in a village to report the same to the Panchayati Adalat concerned is prospective in operation and restricted to cases where possession of land has been obtained by virtue of such devolution.

The bar under s. 34 (5) of the said Act against the entertainability of any suit or application in a Revenue Court until the aforesaid report has been made would not, therefore, operate against a person who succeeded before 1st July, 1952 or who had not acquired actual possession of the land in question.

*Neemar v. Bahgelu* (1) referred to.

Civil Miscellaneous Writ no. 3201 of 1958.

The facts appear in the judgment.

R. K. Mathur, for the applicant.

The standing counsel for the opposite parties.

The Judgment of the court was delivered by—

CHATURVEDI, J:—This is a petition under Articles 226 and 227 of the Constitution praying for the issue of a writ of *certiorari* quashing the orders passed by the Additional Commissioner and the Board of Revenue.

On 19th March, 1956, the petitioner filed a suit against opposite party no. 3 under section 202 of the U. P. Zamindari Abolition and Land Reforms Act (herein-

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after called the 'Zamindari Abolition Act'). In brief, the case of the petitioner was that he was a *sirdar* of the plots in dispute having succeeded his maternal grandmother Smt. Munni who was previously a hereditary tenant of the plots. Opposite party no. 3 denied that the petitioner was the tenant and claimed the tenancy rights or *sirdari* rights in himself. The first court framed as many as seven issues in the cases and it decided all of them in favour of the petitioner. As a result of these findings it decreed the suit. Opposite party no. 3 went up in appeal against that order and it appears that during the course of arguments before the Additional Commissioner a fresh point was taken on behalf of opposite party no. 3. This point was that the petitioner had omitted to make a report to the Panchayati Adalat to the effect that the petitioner had succeeded to the tenancy of his maternal grandmother. In the absence of this report, it was urged that the institution of the suit was barred by the provisions of sub-section (5) of section 34 of the U. P. Land Revenue Act as amended by the U. P. Zamindari Abolition Act, which came into force on the 1st July, 1952. The Additional Commissioner upheld this contention of Opposite-party no. 3 and without deciding the appeal on merits, he dismissed it only on the ground that the petitioner had failed to report his succession under section 34(1) of the U. P. Land Revenue Act and consequently he could not file the suit. The petitioner went up in second appeal to the Board of Revenue. But the Board of Revenue agreed with the Additional Commissioner and dismissed the second appeal: Hence the present writ.

The only question that arises for decision in this petition is whether the Additional Commissioner and the Board of Revenue were right in holding that the present suit was not maintainable in view of the fact that the petitioner had failed to make a report to the

Panchayati Adalat as required by sub-section (1) of section 34 of the U. P. Land Revenue Act. We have carefully read the judgments of both the Additional Commissioner and the Board of Revenue and heard learned counsel for the parties. We think that there is an apparent error of law committed by both the revenue courts mentioned above.

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At the outset it may be stated that in the U. P. Land Revenue Act, before the amendment in 1952, there was section 34 and there was also the sub-section of that section which contained a similar provision of law. Sub-section (5) was to the effect that no revenue court should entertain a suit or application by a person succeeding or otherwise obtaining possession until such person had made a report as required by sub-section (1) of section 34. Under section 34(1) every person obtaining possession by succession or transfer of any proprietary or other right in a mahal or part of a mahal, or the profits thereof, or in any specific area therein which was required to be recorded in the registers prescribed by clauses (a) to (d) of section 32 of the Land Revenue Act was required to report such succession or transfer to the Tehsildar of the tehsil in which the mahal or any part thereof was situate. Clauses (a) to (d) of section 32 of the U. P. Land Revenue Act referred to the registers of proprietary rights and the register of tenancy rights was mentioned in clause (e) of section 32. The old section, therefore, did not require that a person succeeding to any tenancy right or obtaining transfer of such a right should make a report of the fact to the Tehsildar. The U. P. Land Revenue Act was substantially amended by the Zamindari Abolition Act which came into force on the 1st July, 1952. The amended section 34(1) stands as follows:

"34(1) Every person obtaining possession by succession or transfer of any land in village which is

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required to be recorded in the register specified in section 32 shall report such succession or transfer to the Panchayati Adalat exercising jurisdiction in the village in which the land is situate."

The Zamindari rights in agricultural lands have been abolished by the Zamindari Abolition Act. The amended section 32 speaks only of the register of persons cultivating or otherwise occupying land. In view of the amendment in section 32 and also in section 34(1) the amended section 34 (1) now applies to the case of tenancy rights only.

The petitioner claims to have succeeded to the tenancy rights of his maternal grandmother. The question, however, that arises for decision is whether section 34 (1) applies to cases only of succession which opened or the transfers which took place after the section was amended or it applies even to successions or transfers of tenancy rights which had taken place before the amended section came into operation. The section does not purport to be retrospective in its operation and it imposes a duty upon the person who has obtained possession of some tenancy plot by succession or transfer, to report the fact that he has obtained such possession. The acts passed by the legislatures are generally not taken to be retrospective in operation unless there is something in the statute to the contrary or unless the change is a change in a minor matter of procedure. We find it difficult to hold that the provisions of section 34 (1) and (5) can be said to be merely procedural matters. Sub-section (1) imposes a duty upon a person obtaining possession by succession or transfer of making a report to the Panchayati Adalat and sub-section (5) prohibits institution of a suit or application if the person has failed to make the report required by section 34 (1). The matter really affects the right of a person

who fail to make a report and the above two provisions cannot be said to be merely procedural in nature. We are consequently of the opinion that the above provisions of law cannot be said to apply to cases of succession or transfer which took place before the sub-sections were amended by the U. P. Zamindari Abolition Act. The first provision casts a duty upon a person to make a report to the Panchayati Adalat and the second imposes a penalty for the omission to make the report. Sub-section (5) really is penal in nature and reading it along with sub-section (1) we do not think it is possible to say that these two provisions were intended to have retrospective operation. As already stated above, the unamended section 34 did not refer to the succession to tenancy rights. Under the unamended section there was no duty cast upon the petitioner to report to the Tehsildar that he had succeeded to the tenancy rights of his maternal grandmother.

We may mention here that according to the findings of the revenue courts, Smt. Munni, the maternal grandmother of the petitioner died on the 6th December, 1948. The law as it stood on that date did not require the petitioner to make a report of his having succeeded Smt. Munni. Such a provision was introduced for the first time after the lapse of more than three and a half years. The subsequent change in the law did not make it obligatory on every body who had acquired tenancy rights by succession or transfer to make a report to the Panchayati Adalat of that fact, irrespective of the period that might have elapsed since they acquired the rights. Such an interpretation would make the provisions very unreasonable and that could not have been the intention of the Legislature. We consequently hold that, the provisions of section 34 of the U. P. Land Revenue Act, as amended by the U. P. Zamindari Abolition Act, are applicable only to cases of transfer or succession

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which took place after the date of the amendment. The Board of Revenue itself has taken the above view in a case reported in *Neemar v. Bhagelu* (1).

The second point urged by learned counsel for the petitioner appears to be equally unanswerable. His contention is that section 34 (1) requires a person to make a report only after he has obtained possession of the tenancy land by succession or transfer. The final fact which imposes a duty of making the report is his obtaining possession of the tenancy land. We have already quoted the provisions of section 34 (1) and a reading of those provisions clearly shows that the duty of making the report comes into operation only after a person, who has succeeded or has obtained a transfer of the land, has actually obtained possession of it as a result of the succession or transfer. In the present case the undisputed facts of the case are that the petitioner was a minor when he succeeded to the tenancy rights of his widowed grandmother and continued to be a minor till the date the suit was filed. The suit was for acquiring possession of the land in suit which the petitioner had not obtained as a result of his succeeding to the rights of his maternal grandmother. Not having obtained possession of the land, no duty was imposed upon him of making a report to the Panchayati Adalat under section 34(1) of the U. P. Land Revenue Act. Learned counsel for the respondent contended that the petitioner should be taken to have obtained constructive possession from opposite party no. 3. But the provisions of section 34 (1) do not seem to refer to constructive possession by persons of land in which they have merely tenancy rights.

For the reasons given above we think that this writ petition should be allowed. We accordingly direct the

(1) 1958 A.L.J. (Rev. Sec) 203.



issue of a writ in the nature of *certiorari* quashing the judgment of the Additional Commissioner of Faizabad, dated the 18th October, 1957 and of the Board of Revenue, dated the 30th August, 1958. The result of the quashing of the above two judgments would be that Appeal no. 389 of 1956-57 *Rahim v. Suraj Bali* shall be deemed still to be pending in the court of the Additional Commissioner, Faizabad. That appeal is consequently to be disposed of by the Additional Commissioner on the merits. The petitioner will be entitled to his costs of this petition from opposite party no. 3.

*Application allowed.*

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